TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 643

CHARLES YOUNG, APPELLANT,

vs.

ANTHONY MASCI

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED JANUARY 27, 1933

(37,340)

(37,340)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 643

CHARLES YOUNG, APPELLANT,

vs.

ANTHONY MASCI

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

INDEX

	Original	Print
Record from supreme court of New Jersey	1	1
Summons (omitted in printing)	1	
Complaint (omitted in printing)	2	
Answer of defendant Charles Young (omitted in printing)	4	
Reply of defendant Charles Young (omitted in printing)	6	
Notice re amended complaint (omitted in printing)	7	
Order amending complaint (omitted in printing)	8	
Amended complaint	9	1
Notice of motion to strike out amended complaint and parts thereof	13	4
Reply denying motion to strike	17	6
Answer to amended complaint	19	7
Reply to answer to amended complaint (omitted in printing)	24	
Postea	25a	10
Judgment on postea	25b	11
Postea, Masci vs. Balbino (omitted in printing)	25	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1933

	Original	Print
Statement of evidence	26	12
Appearances	26	12
Testimony of Anthony Condreras (omitted in printing)	27	
Frank Sibrava (omitted in printing)	42	
Michael Balbino	45	12
Colloquy between court and counsel	63	27
Testimony of Anthony Masci	85	29
Testimony of Salvatore Arnold (omitted in printing)	98	
Motion for non-suit (omitted in printing)	100	
Testimony of Charles W. Young	101	42
Lena Balbino	104	45
Michael Balbino (recalled)	114	54
James Shaw (omitted in printing)	132	
Irwin H. Simon	140	72
Motion for direction of verdict	144	75
Charge to jury	145	76
Plaintiff's exceptions (omitted in printing)	155	
Defendant's exceptions	155	83
Plaintiff's requests to charge (omitted in printing)	157	
Rule to show cause	159	84
Reasons, on rule (omitted in printing)	161	
Opinion per curiam (omitted in printing)	162	
Remittitur	164	85
Notice of appeal	165	86
Exhibits "P-4" and "D-2"—Excerpts from statute (omitted in printing)	171	
Exhibits "P-1" to "P-3"—Photographs (omitted in printing)	173	
Exhibits "P-6" and "P-7"—Photographs (omitted in printing)	173	
Proceedings in court of errors and appeals of New Jersey	174	89
Judgment	174	89
Opinion, Donges, J.	175	90
Petition for appeal (omitted in printing)	181	
Assignments of error	182	95
Order allowing appeal	186	98
Bond on appeal (omitted in printing)	187	
Citation and service (" " ")	192	
Precipe for transcript of record (" " ")	193	
Clerk's certificate (" " ")	194	
Statement of points to be relied upon and designation for printing record	195	99

[fols. a-9]

IN SUPREME COURT OF NEW JERSEY, PASSAIC COUNTY

Action at Law

ANTHONY MASCI, Plaintiff,

vs.

CHARLES YOUNG, Defendant

AMENDED COMPLAINT—Filed Nov. 8, 1930

First Count

Plaintiff, residing in the City of New York, and State of New York, for his amended cause of action, says that:

1. On or about the 4th day of August, 1929, defendant, Charles Young, was the owner of a certain automobile which he caused to be operated in and along a certain public highway known as Arthur Avenue, at or near the intersection of E. 183rd Street, in the City of New York, State of New York, in a general northerly direction.

2. On the said date, one Michael Balbino, was the operator of the said automobile owned by defendant, Charles Young.

3. Said automobile was then being operated with the consent and permission of defendant Charles Young, either express or implied.

4. By virtue of the laws of New York State applicable to the within cause of action because it is transitory, which provide that:

Laws of 1924 (incorporated in the Vehicle and Traffic Act of the State of New York):

Every owner of a motor vehicle or motorcycle, operated upon a public highway shall be liable and responsible for death or injury to person or property, resulting from negli- [fol. 10] gence in the operation of such motor vehicle or

motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner.

The defendant, Charles Young, is legally responsible for the negligence of the operator Michael Balbino.

5. On said date, plaintiff was a pedestrian, lawfully crossing said Arthur Avenue, at the crosswalk at the intersection of E. 183rd Street, in a general westerly direction.

6. On said date said Michael Balbino did operate the said automobile of Charles Young, in such a careless, negligent and reckless manner, that as a direct and proximate result thereof, he caused same to run into, strike and knock down the said plaintiff, causing him severe and serious injuries.

7. The negligence of Michael Balbino, which is imputable to the defendant, Charles Young, consisted of:

a. Operating the said automobile on the wrong side of the highway,

b. At a high and excessive rate of speed, without proper control,

c. Without giving a proper warning or signal of approach,

d. Without maintaining proper lights, and with defective mechanism and without proper brakes,

e. Without keeping a proper lookout, disregarding the safety of pedestrians lawfully crossing said street,

f. In violation of the laws and decisions of the State of New York, and in violation of the Vehicle and Traffic Act of the State of New York, and

g. Otherwise in a careless and negligent manner.

[fol. 11] 8. As a direct result of the premises aforementioned, and without any negligence or contributory negligence on the part of the plaintiff, he sustained severe and serious injuries of an internal, external and permanent nature. Plaintiff sustained severe lacerations of the scalp, requiring a number of sutures; a compound fracture of the

left leg, permanently injuring same; general body and back injuries; and general internal injuries. He has and will be unable to walk again for the remainder of his life. He has and will be confined to the hospital home and bed for the remainder of his life. He has and will be obliged to expend divers sums of monies for hospital obligations; doctors; operations and for other aids and devices necessary. He has and will be unable to attend to his regular duties; thereby sustaining pecuniary losses. He has and will suffer from headaches, dizziness, nervousness, mental and physical pain, and loss of sleep. His clothes were torn and ruined.

Wherefore plaintiff will demand, as damages the sum of Fifty Thousand ($50,000.00) Dollars, on the first count.

Second Count

1. Plaintiff repeats and reiterates paragraphs one to six inclusive, of the first count, and makes them part of this count.

2. On or about the 2nd day of January, 1930, plaintiff commenced an action at law against Michael Balbino, in the New Jersey Supreme Court charging the said Michael Balbino with negligence in the operation of the automobile owned by defendant Charles Young, a certified copy of which will be offered at the time of the trial.

3. On or about the 8th day of January, 1930, Michael [fol. 12] Balbino was served with the summons and complaint on the plaintiff's cause of action.

4. On or about the 2nd day of June, 1930, after the action was properly noticed, the matter came on for trial, and the jury returned a verdict in favor of the plaintiff and against the defendant, Michael Balbino, in a certain sum, a certified copy of which judgment will be offered at the time of the trial.

5. On or about the 3rd day of June, 1930, a postea was filed with the clerk of the New Jersey Supreme Court, and judgment was accordingly entered on the record.

6. By virtue of the foregoing premises, the judgment returned on plaintiff's cause of action, charging Michael Balbino with negligence in the operation of the automobile

of said Charles Young, at the same time and place as herein mentioned, as a result of one and the same act, adjudicates the negligence of the operator Michael Balbino and the matter is therefore res adjudicata.

7. Plaintiff, repeats and reiterates paragraph eight of the first count of the complaint, as if the same were recited verbatim and makes that count a part hereof.

Wherefore plaintiff will demand as damages the sum of Fifty Thousand ($50,000.00) Dollars, on the first count.

Wherefore plaintiff will claim judgment in the sum of Fifty Thousand ($50,000.00) Dollars, together with costs of suit to be taxed.

Aaron L. Simon, Attorney for Plaintiff.

[fol. 13] In Supreme Court of New Jersey, Passaic County

[Title omitted]

Notice of Motion to Strike Out Amended Complaint and Parts Thereof—Filed Oct. 14, 1930

To Aaron L. Simon, Attorney of Plaintiff.

Sir:

Please take notice, that we shall appear before the Honorable Peter F. Daly, one of the Justices of the New Jersey Supreme Court, or such other judge or Supreme Court Commissioner that shall be sitting in his place or stead, on Saturday, the first day of November, 1930, at the Court House in Paterson, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard and move for a Rule or Order to Strike Out the Amended Complaint and the parts thereof hereinafter specified upon the grounds hereinafter stated:

1. The entire complaint, upon the ground that the same is so framed as to embarrass and delay a fair trial in violation of Rule 39 of the New Jersey Supreme Court.

[fol. 14] 2. The first count, upon the ground that the same is obscure and uncertain and in violation of the rules of pleading in that the same does not allege any particulars or

certainty as to when, where or how the defendant Charles Young is alleged to have given consent and permission to Michael Balbino to use his automobile.

3. The first count, upon the ground that the same is so framed as to embarrass and delay a fair trial in that the same alleges matters with respect to a statute of the State of New York, particularly set forth in the fourth paragraph of the first count without, in any place, alleging that the defendant Charles Young was ever in the State of New York and without stating any facts by virtue of which the statutes of the State of New York have any force and effect upon said Charles Young.

4. The first count, upon the ground that the same does not state a cause of action.

5. The first count, upon the ground that the same does not state a cause of action, in that the same alleges no act or default by Charles Young from which liability to the plaintiff could arise but undertakes so to apply the New York law quoted in the fourth paragraph of the said amended complaint as to make the defendant Charles Young, who is not alleged to have ever been in New York, liable for negligence of Michael Balbino, while operating defendant's car in New York under a mere loan or bailment made in New Jersey, whereas so to apply the said statute would deny this defendant Charles Young equal protection of the law and take his property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

6. The seventh paragraph of the complaint, in so far as the same alleges that the negligence of Michael Balbino is imputable to this defendant in that the said paragraph [fol. 15] states a mere conclusion of law and an erroneous conclusion at that.

7. The entire second count in that it does not allege a cause of action against Charles Young.

8. The first paragraph of the second count, for all of the reasons hereinbefore alleged as grounds for striking out the first count and the several paragraphs and allegations thereof hereinbefore mentioned.

9. The entire second count, upon the ground that the same fails to allege a cause of action against this defendant, in that the same does not allege that this defendant had any notice that the case mentioned in said second count would come on for trial on June 2nd, 1930, or at any other time and if a judgment against Michael Balbino could in any case preclude the defendant Charles Young from defending an action by the present plaintiff in any way or manner for the said Charles Young to be so interfered with in the defense of an action because of judgment against Michael Balbino in an action in which he had no notice that any judgment was to be entered, would deprive the said Charles Young of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

10. The second to sixth paragraphs of the second count, in that they are so framed as to embarrass and delay a fair trial in that the same alleged matters and transactions between the plaintiff and a third party, Michael Balbino, without alleging any facts on account of which a judgment against Michael Balbino could, in any wise, be binding upon the defendant Charles Young, or interfere, to any [fol. 16] degree, with the full defense of any action which might be brought against the said Charles Young by the plaintiff Anthony Masci.

Yours, etc.,
Kellogg & Chance, Attorneys for Defendant.

Dated: October 9th, 1930.

Service acknowledged this 11th day of October, 1930.
Aaron L. Simon, Attorney for Plaintiff.

[fol. 17] In Supreme Court of New Jersey, Passaic County

[Title omitted]

Rule Denying Motion to Strike Out Amended Complaint and Parts Thereof—Filed Nov. 14, 1930

This matter being opened to the court by Kellogg & Chance, attorneys for the defendant in the presence of

Irving Simon, Esquire, representing Aaron L. Simon, Esquire, attorney of plaintiff, and it appearing that notice of motion to strike out amended complaint and parts thereof be made November 1st, 1930, which notice was dated October 9th, 1930, was duly served upon plaintiff's attorney; and it further appearing that on the first day of November, 1930, said motion was postponed to November 7th, at two P. M., by the Honorable Peter F. Daly, Justice of the Supreme Court and referred to the undersigned for hearing and determination, and the said motion having been duly made and the arguments of counsel for the respective parties having been heard and considered,

It is, on this 12th day of November, 1930, ordered that the said motion be, and the same hereby is denied.

[fol. 18] And it is further ordered that the defendant Charles Young have twenty days from the date hereof in which to file answer to the said amended complaint.

William B. Mackay, Judge.

[fol. 19] In Supreme Court of New Jersey, Passaic County

[Title omitted]

Answer to Amended Complaint—Filed Nov. 14, 1930

Defendant residing in the City of Passaic, County of Passaic and State of New Jersey for answer to the complaint herein says:

First Defense to First Count

1. Answering the first paragraph of the first count this defendant admits that on August 4th, 1929, he was the owner of a certain automobile, but denies the other allegations of the first paragraph.

2. The second paragraph of the first count is denied, except that this defendant admits on information and belief that Michael Balbino did operate his automobile on said date.

3. Answering the third paragraph of the first count this defendant admits that he loaned his automobile in the State

of New Jersey to Michael Balbino. Except as thus admitted the third paragraph of the first count is denied.

4. The fourth paragraph of the first count is denied, except that part thereof which purports to quote a statute of the State of New York as to the particulars of which this defendant makes no admission or denial, except that [fol 20] he denies that it has any application to this case or ever imposed any obligations upon this defendant, who at all times mentioned in the complaint was located in the State of New Jersey and had no knowledge or information concerning the statutes of New York.

5. On information and belief the fifth paragraph of the complaint is denied, except that this defendant admits information that the plaintiff was on the street on the date mentioned.

6. On information and belief the sixth paragraph is denied, except that he is informed that a collision between his automobile and the plaintiff did take place.

7. The seventh paragraph of the first count is denied, except that this defendant has no knowledge or information sufficient to form a belief as to the extent of any injuries and damages to the plaintiff.

Second Defense to First Count

At the time and place of the happening of the accident inaccurately described in the complaint defendant's automobile was not being driven by this defendant, or for this defendant and was not being driven in and about the business of this defendant or by anyone for whose conduct this defendant is responsible.

Third Defense to First Count

This defendant loaned his car to Michael Balbino in the State of New Jersey and at the said time did not know about any such statute in the State of New York as is alleged in the first count of the amended complaint and claims that to apply the said statute so as to make this defendant liable for anything done or omitted by Michael Balbino who was not this defendant's agent or servant, [fol. 21] would amount to confiscation, would deny this defendant equal protection of the law and take his property

without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

Fourth Defense to First Count

The accident inaccurately described in the complaint was caused and contributed to by the negligence of the plaintiff in that he failed to exercise reasonable judgment as to when and how to cross the street, failed to make reasonable effective observation before crossing the street and while in the act of passing over same and furthermore the plaintiff as this defendant is informed, after the defendant Michael Balbino had blown the horn of the automobile involved, stopped and so conducted himself as to indicate that he was to permit the said Michael Balbino to have the right of way, and after so doing suddenly proceeded forward and into and against the automobile in question, and otherwise recklessly, negligently and carelessly conducted himself.

First Defense to Second Count

1. The answer made by paragraphs one to six, inclusive of the first defense to first count are repeated in answer to the first paragraph of the second count.

2. Answering the second paragraph of the second count this defendant admits information and belief that the allegations contained in the second paragraph of the second count are true.

3. This defendant has no knowledge as to the matters alleged in the second paragraph of the second count, but is informed that the allegations therein contained are true.

[fol. 22] 4-5-6. This defendant has no knowledge or information sufficient to form a belief as to the matters alleged in the fourth, fifth and sixth paragraphs of the complaint, except that he avers that no notice was received by him that action of the plaintiff against Michael Balbino was to come on for trial on June 2, 1930, or that the matter of the plaintiff against Michael Balbino was to be submitted to a jury or tried on that date.

7. The answer made by the first defense to the first count to paragraph eight of the first count is repeated in answer to the seventh paragraph of the second count.

Second Defense to Second Count

The second defense to first count is repeated as a second defense to the second count.

Third Defense to Second Count

The third defense to the first count is repeated as a third defense to second count.

Fourth Defense to Second Count

The fourth defense to first count is repeated as a fourth defense to the second count.

Fifth Defense to Second Count

This defendant had no notice that action of plaintiff against Michael Balbino would come on for trial or be submitted to a jury for verdict on the said date (June 2, 1930) and the said Michael Balbino was not the agent or [fols. 23 & 24] servant of this defendant. Wherefore, this defendant maintains that to treat the judgment against Michael Balbino as binding upon this defendant or as preventing this defendant from contesting liability to the plaintiff would deny this defendant equal protection of the law and take his property without due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

Kellogg & Chance, Attorneys of Defendant Charles Young.

[fol. 25-a] In Supreme Court of New Jersey, Passaic County

Action at Law

Anthony Masci, Plaintiff,

vs.

Charles Young, Defendant

Postea—Filed March 4, 1931

The above entitled cause of action was referred for trial before Judge William B. Mackay and a mixed jury of

twelve, in the above entitled court, on February 25, 1931, and February 26, 1931, which resulted in the jury having rendered the following verdict:

For the plaintiff, Anthony Masci, against the defendant, Charles Young, the sum of Fourteen Thousand ($14,000.00) Dollars.

William B. Mackay, Circuit Court Judge.

Dated: February 26, 1931.

[fol. 25-b] In Supreme Court of New Jersey

Action at Law

Anthony Masci, Plaintiff,

vs.

Charles Young, Defendant

$14,000.00

On Postea

Judgment

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of fourteen thousand dollars, besides costs to be taxed nisi.

On motion of

Aaron L. Simon, Attorney.

Entered March 4, 1931.

See Min. Oct. Term 1931 under date of Nov. 24, 1931.

Above R. to S. C. dischgd. and verdict reduced to $10,000.00

99.12

$10,099.12

[fols. 26-44] In Supreme Court of New Jersey, Passaic Circuit

At Law

Anthony Masci, Plaintiff,

vs.

Charles Young and Michael Balbino, Defendants

Statement of Evidence

Paterson, N. J., February 25, 1931.

Before Hon. William B. Mackay, Judge, and a Jury.

Appearances:

For the Plaintiff: Aaron L. Simon, Esq.
For the Defendant Young: Kellogg and Chance, Esq., by Robinson Chance, Esq.

(A jury was called and sworn.)
(A recess was taken until 1:35 P. M.)

Afternoon Session, 1:35 P. M.

* * * * * * *

[fol. 45] Michael Balbino, sworn.

Direct examination.

By Mr. Simon:

Q. Mr. Balbino, where do you live?
A. 345 Passaic Avenue, Lodi, New Jersey.
Q. On August the 4th, of 1929, were you driving an automobile in New York City, corner of 183rd Street and Arthur Avenue?
A. Yes.
Q. Your car met with an accident?
A. Yes.
Q. And Mr. Masci, this gentleman here, is that the gentleman that was hurt (indicating the plaintiff)?
A. Yes, sir.
Q. Well, now, whose car was this?

A. Mr. Young's.

Q. How did you come to get this car?

A. Well, I asked Mr. Young for a loan of his car.

Q. Yes, and what did he say?

A. He says, "O. K."

Q. And who was with you in this car?

A. My wife, my kiddies, and my in-laws.

Q. And where did you tell Mr. Young you were going?

A. I told Mr. Young that I was going to some beach, but [fol. 46] I didn't tell him what beach it was.

Q. A beach where?

A. Well, I just told you I told him I was going to some beach, but I didn't mention the beach where I was going to.

Q. What did you have in mind?

A. Down to Rye Beach.

Q. Rye Beach. You told him you were going to Rye Beach. Where is that?

A. I didn't exactly tell him Rye Beach.

Q. What were the words you told him, again?

A. I told Mr. Young that I was going to some beach, but I didn't mention what name of the beach I was going to.

Q. I see. Did you tell him where this beach was at all?

A. No, sir.

Q. Sure about that?

A. No, sir.

Q. Did you tell him whether this beach was in New York State?

A. I didn't tell him where Rye Beach was. I simply told him that morning that I was going to some beach.

Q. You said Rye Beach; you went to Rye Beach?

A. I am telling you that I went to Rye Beach, yes.

Q. You say you didn't tell him where Rye Beach was?

A. No, sir, he didn't ask me what beach, what was the name of the beach.

Q. I see. You told him that you were going to a beach?

A. To some beach.

Q. To some beach?

A. Yes.

Q. And you didn't tell him where the beach was?

A. No, sir.

Q. Well, now, who lived in Rye Beach?

Mr. Chance: I object to that as immaterial.

Mr. Simon: I am going to show the materiality of this. I am going to show it is very, very important. I plead surprise, if your Honor please.

Mr. Chance: I object to it.

[fol. 47] The Court: That question is not relevant.

Mr. Simon: I am going to lay the foundation, if your Honor please, for the purpose of this trip to prove—to impeach his testimony by a statement that I have.

The Court: Impeach your own witness?

Mr. Simon: Yes.

Mr. Chance: You are impeaching your own witness.

Mr. Simon: To neutralize his testimony.

The Court: You can't impeach his testimony.

Mr. Simon: I am taken by surprise, and I am going to neutralize his statement. He made a statement in our office under oath, and we have the statement here with us, and I certainly am surprised at it.

The Court: Well, that question you asked is not relevant.

Mr. Simon: It is not relevant?

The Court: No.

Mr. Simon: Well, it is going to lay the foundation why he said he was going to Rye Beach.

By Mr. Simon:

Q. Well, now, were you in my office at all?

A. Yes, sir.

Q. Did you make a statement in my office as to where you were going and what you told Mr. Young where you were going?

A. I told you I didn't tell Mr. Young what beach I was going to; I just told him a beach.

Q. You told me that?

A. I didn't tell Mr. Young that I was going to Rye Beach, no, sir.

Q. Is this your statement, Michael Balbino (handing a paper to the witness)? Is that your signature there?

A. Yes, sir, that is mine.

Q. No doubt about it?

A. Yes, that is my signature.

[fol. 48] Q. I see. Now, did you say in my offices on March 24, 1930——

Mr. Chance: I object to counsel reading from any document which is not in evidence.

Mr. Simon: I am laying a foundation for it. I will put it in evidence at the proper time.

Mr. Chance: My objection is reading from any document that is not in evidence.

The Court: Well, you have now what? What is it?

Mr. Simon: A statement made in my offices.

The Court: A statement made in your office?

Mr. Simon: That he told Mr. Young where he was going, to Rye Beach.

The Court: Who prepared the statement?

Mr. Simon: My offices did.

The Court: We must find out from him, if he knows about it.

By Mr. Simon:

Q. Did you tell the young man in my office——

The Court: No, show him the statement.

Q. I show you a statement that you signed, Michael Balbino, on November 10, 1930——

The Court: Well, did he sign it?

Q. Did you sign it?

A. Yes, sir, that is my signature.

Q. All right. Is that the statement you signed on November 10, 1930?

A. Yes, sir, that I was going to Rye Beach.

Q. That is the statement you signed?

A. Yes.

Q. Did you read it?

A. Yes.

Q. Read it again and see whether or not that is the statement you signed and if it is the same statement that you now have in your hands. That is true, isn't it, as you said?

A. Yes.

[fol. 49] Mr. Simon: I offer it in evidence.

Mr. Chance: I object to its going in evidence.

The Court: Why?

Mr. Chance: Because it is incompetent for this man to prove his case by producing a signed statement which is signed by a witness called by him.

The Court: It is his own witness. He is calling him to refresh his recollection of past events.

Mr. Chance: His recollection has either been refreshed or it has not, and it doesn't appear that it has not been refreshed. That being so, why, he can testify without the paper.

By the Court:

Q. Well, you have looked at that paper, haven't you?

A. Yes, sir, your Honor.

Q. And you have read it?

A. Yes.

Q. And you signed it, did you?

A. Yes, sir. Yes, sir.

Q. And is the statement contained in that paper true?

A. Yes, sir.

Q. It is. Now, then, what is the situation? What is the fact? What did you say to Mr. Young, having refreshed your recollection?

A. I told Mr. Young if I could borrow his car, and I recall I told him I was going to some beach and I didn't mention the name of the beach that I was going to. That is the truth.

Q. Didn't you tell Mr. Young you were going to Rye Beach?

A. No, sir, your Honor. I told Mr. Simon that, not Mr. Young.

Q. You told Mr. Simon that?

A. Yes, sir.

Q. Well, then, this writing that you are referring to is something that you told Mr. Simon; is that it?

A. Yes, sir.

[fol. 50] Q. But what you told Mr. Simon, you said, is what you told Mr. Young, but that is not so; is that it?

A. No, sir.

Q. Well, then, you didn't tell Mr. Simon the truth; is that it?

A. Well, Mr. Simon asked me where I went, so I told him I went to Rye Beach, but I didn't tell Mr. Young that morning where I was going with my family. All I told him, I was bound to some beach, I don't know where.

Q. Well, weren't you asked by Mr. Simon or someone in his office about this matter?

A. Yes, sir.

Q. Well, now, didn't you say "On the morning of the accident, about nine o'clock or so, Mr. Young gave me permission to use his car"?

A. Yes, sir.

Q. And is that so?

A. Yes.

Q. Was that true?

A. Yes, sir.

Q. And then is it true that he, Mr. Young, "asked where I was going and I remember saying to him that I was going to Rye Beach with my family and in-laws"? Is that so?

A. I told him I was going to some beach, but I didn't mention the beach to him.

Q. Well, then this statement to Mr. Simon wasn't true; is that right?

A. It is true that I went to Rye Beach.

Q. No, but I mean it is not true that you told that to Mr. Young; is that it? You said that Mr. Young asked you where you were going?

A. Yes.

Q. And you said you remember telling Mr. Young that you were going to Rye Beach with your family and your in-laws? Did you or didn't you?

A. Well, I didn't tell him that I was going—to some beach. I mentioned it was some beach, I didn't know where I was bound for.

Q. Then, this wasn't a correct statement; you didn't tell Mr. Young this?

A. No, sir; I didn't tell Mr. Young.

[fol. 51] Q. But you told Mr. Simon that you told Mr. Young that, didn't you?

A. I don't recall that.

Q. Well, it is there, isn't it, or what about it? Tell us what about it.

A. This is my signature, but that is not my handwriting.

Q. Well, it says there that Mr. Young asked you where you were going.

A. And I told him that I was going to some beach, I don't know what beach it was.

Q. And you told him, Mr. Young, you were going to Rye Beach with your family and in-laws?

A. I don't recall that, your Honor.

Q. You don't remember that?

A. No, sir.

Q. You said further, "Mr. Young knew I was going to New York, and I certainly am surprised to hear that the truth is doubted. I have read the above and am willing to swear to its truth." What about that? Is that so?

A. All I told him I was going to some beach.

The Court: I don't understand that myself.

By Mr. Simon:

Q. Is it true that Mr. Young knew that you were going to Rye Beach?

Mr. Chance: I object to that because it is immaterial what he told him. He loaned him the car, and the liability as a bailee in this State was established by Doran against Thompson and other cases, and it is immaterial what the man knew about where the car was going.

Mr. Simon: We say it is very material as to where he was going, because we base our action upon the New York statute.

Mr. Chance: The New York statute doesn't apply in New Jersey.

Mr. Simon: Well, that is a question for the Court. At this time we say it is very material, and it will be a ques-[fol. 52] tion for his Honor to decide later on, whether it is material.

By Mr. Simon:

Q. Did you know at the time that you borrowed the car that you were going to Rye Beach?

A. No, sir.

Q. When did you first make up your mind to go to Rye Beach?

A. The last moment.

Mr. Chance: I object to it as immaterial when he made up his mind to go to Rye Beach.

Mr. Simon: I am laying the foundation for it.

Mr. Chance: The mental processes of this man are no foundation for liability on Mr. Young's part.

The Court: I will let it stand.

By Mr. Simon:

Q. You were brought over to my offices, were you not?

A. Yes, sir.

Q. And at that time you were showed an answer by the defendant, through Mr. Chance, that they denied that you had permission to go to New York and then you were asked for a statement, were you not?

Mr. Chance: I object to that because there is no such answer and it contains no warrant for assumption of the fact that there is.

By Mr. Simon:

Q. You were asked to give us a statement then, weren't you?

A. You asked me to give you a statement.

Q. Yes.

A. Yes.

Q. Is it true, then, that you said at that time. "I remember saying to him"—meaning Mr. Young—"that I was [fol. 53] going to Rye Beach with my family and in-laws"?

A. I told you that. I told him I was going to some beach. I told Mr. Young; whatever beach that was I didn't know.

Q. Did he ask you what beach?

A. No, sir.

Q. I see. Do you now say that you never told me, myself, that you told Mr. Young you were going to Rye Beach and he knew it?

Mr. Chance: I object to it as immaterial what he told him.

Mr. Simon: I am going to take the stand.

Mr. Chance: It is no proof of the case against Mr. Young what conversation took place between Mr. Simon and Mr. Balbino. Mr. Young is not alleged to have been present, nobody shows him to have been present at any conversation between those two gentlemen, and I claim this is going far afield to try to prove liability on the part

of Mr. Young by some conversation between Mr. Simon and Mr. Balbino, and I object to the question.

The Court: Well, except that if he made this written statement to the effect that he had actually told this man he was going to Rye Beach and he says that statement is true, that he signed it as true, it certainly does not correspond with what he has been testifying to on the witness-stand, and I suppose on his plea of surprise counsel is entitled to neutralize the effect of that testimony and attempt to show what the fact really is.

Mr. Chance: Well, if he has not proved his case on his questions, I don't see, if your Honor please, that he proves it any more by trying to prove some conversation at some other time when the man wasn't under oath.

The Court: Well, this is the man that took the car; this is the man that was driving the car.

[fol. 54] Mr. Chance: Yes.

The Court: And this is the man that obtained the car.

Mr. Chance: Yes.

The Court: Certainly, anything relating to his method of obtaining the car, I should say, would be quite material.

Mr. Chance: Yes, anything which relates to the method of his obtaining the car is material, but not the conversation that took place some other time.

The Court: Now, then, this witness told him before the trial that he, in borrowing this car, said to the owner, "I am going to Rye Beach." That was put in writing and he signed it. He made a statement of the fact at that time. Now, it must be a surprise to have that statement, signed by the witness and which he now admits to be a true statement, to have him testify before the statement is shown to him that that is not the fact, and then when shown the paper say, "Yes, that is true"; and then he said, "Well, I told that to Mr. Simon, but that is not the fact." So I should think that that paper would be material in this case.

Mr. Chance: Well, there is another consideration, that he called this man as his witness and he is trying to impeach the witness. I object to the performance on that ground, further.

The Court: It is not impeaching.

Mr. Chance: The thing I am getting at is that a transaction between Mr. Balbino and Mr. Simon is a transac-

tion between other parties than Mr. Young, and it is mere hearsay conversation, something that took place at another time and is not evidential.

The Court: Well, now, is it hearsay?

[fol. 55] Mr. Chance: It seems to me that it is hearsay. The transaction took place between Mr. Young and Mr. Balbino in the first instance at the time when he borrowed the car.

The Court: Yes.

Mr. Chance: Now, then, any admissions or statements——

The Court: That was the transaction, wasn't it?

Mr. Chance: That was the transaction.

The Court: All right.

Mr. Chance: But not which took place when this man was taken up to Dr. Simon's office—that wasn't the transaction. That was an admission or a statement made by this man which cannot be binding upon Mr. Young. That is the reason I object to it.

The Court: Well, now, why can't it?

Mr. Chance: Because there is nothing in the case that he was ever authorized to go to Dr. Simon's office and make statement for Mr. Young.

The Court: He is the man borrowed the car.

Mr. Chance: Yes, but borrowing the car doesn't authorize a man to go to Dr. Simon's office and make statements for Mr. Young.

The Court: You didn't object to the question when it was asked, as to how he obtained the car and what was said, did you?

Mr. Chance: No, I don't object to this man's testifying as to anything that took place on that day.

The Court: And yet from your argument you say it is irrelevant.

Mr. Chance: No, what I say is irrelevant is his statement made to Dr. Simon at a later date about what took place before.

The Court: Well, you would rely on that.

[fol. 56] Mr. Chance: No, I wouldn't.

The Court: Yes. Here is the man borrowed the car.

Mr. Chance: Yes.

The Court: He took the car. Now, under what conditions did he take it? What did he have to do?

Mr. Chance: That is all right.

The Court: What authority did he have?

Mr. Chance: That is another thing.

The Court: Now, he gets on the stand and he says, and you don't object to it—he said what he told Mr. Young.

Mr. Chance: No objection to that.

The Court: You don't object.

Mr. Chance: That is the transaction.

The Court: All right. He then tells Mr. Simon, "This is what I told Mr. Young," when he gets on the witness-stand, and Mr. Simon said, "Wait a minute. Is that what you told Mr. Young?"

"Yes."

"Are you sure?"

"Yes."

"Well, didn't you make a statement at another time in contradiction of that, which is different?"

Mr. Chance: Well, he hasn't said that he made a statement different. He says he signed that paper, but he hasn't said he said what is in it.

The Court: He said, "No," he didn't make another statement contradicting that, and he said, "Well, let me show you a paper. Is that paper true?"

"Yes."

"Well, doesn't that contradict it?"

Well, then, he says, "No."

[fol. 57] "No?"

Now, then, what is the explanation? I think that is all relevant, all of that testimony. It appears to be, under the D'Adamo case, State vs. D'Adamo. It appears to be relevant under the evidence. It appears to be relevant under the Morline case.

Proceed. What is the next question?

By Mr. Simon:

Q. Do you remember you were here last week in court?

A. Yes, sir.

Q. Do you remember my having asked you whether or not you were subpœnaed by the defendant and you said, "Yes"?

A. Yes, sir.

Q. And at that time I asked you whether or not you were going to tell the same story as you told in my office and you said, "Yes"?

A. Yes, sir.

Q. Yes. And then you further said, "You needn't worry; I won't double-cross you"? Do you remember saying that?

A. Yes.

Q. Well, now, since when did you change your story?

Mr. Chance: I object to that, because he has not said that he changed his story yet. He has not ever said that he said exactly what is in this paper that you have.

By Mr. Simon:

Q. You made a statement wherein you said——

Mr. Chance: I object to reading from any statement that is not in evidence.

By Mr. Simon:

Q. Did you say to Mr. Young that, "I am going to Rye Beach with my family and in-laws"?

A. I told Mr. Young that morning I was bound to some beach.

[fol. 58] Q. No, did you say to Mr. Young that, "I was going to Rye Beach with my family and in-laws"?

A. I didn't mention Rye Beach.

Q. You didn't mention Rye Beach?

A. Not to Mr. Young, no, sir.

Q. So, then, this statement that you mentioned to him isn't true, then, is it?

A. I didn't tell Mr. Young I was going to Rye Beach. I told him I was bound to some beach.

Q. So that is not true here?

A. That is the statement I gave you, that I was going to Rye Beach.

Q. Yes. "I remember saying to him I was going to Rye Beach"; is that true or not true?

A. That Mr. Young knew I was going to some beach.

By the Court:

Q. What do you mean? Do you mean that that is the statement you gave to Mr. Simon, that you were going to Rye Beach?

A. He asked me where I went, so I told him I went to Rye Beach with the car, I was bound for Rye Beach, but the morning I left from home I didn't tell Mr. Young I was going to Rye Beach. I told him I was bound to some beach, but I don't know what beach it will be.

Q. But why did you say in that paper that you told Mr. Young you were going to Rye Beach? What did you mean by that? Do you mean you don't understand it?

A. I don't understand it.

Q. Why didn't you understand it? What didn't you understand about it?

A. Well, I didn't mention Rye Beach to Mr. Young that morning.

By Mr. Simon:

Q. Did he ask you where you were going—Mr. Young?

A. Yes, sir.

Q. And what did you tell him then?

A. I told him I was bound to some beach, I don't know where.

[fol. 59] Q. Have you any members of your family or somebody connected or directly related to you who live in Rye Beach?

Mr. Chance: I object to it as immaterial. We don't care whether he has anybody in Rye Beach.

By Mr. Simon:

Q. Now, nobody told you not to say that you were going to Rye Beach because Rye Beach is in New York state, did they?

A. No, sir.

Q. Why is it, then, that you told me last week, right in this court room, "You needn't worry; I won't double-cross you; I will stick to the statement I made"?

A. I don't quite understand you.

Q. Did anybody talk to you about this case since last week?

A. Since last week?

Q. Yes.

A. Yes, you did.

Q. Yes. Besides me did anybody talk to you?

A. Yes, sir, your brother.

Q. Yes. And besides my brother and I did anybody talk to you about this accident?

A. No, sir.

Q. You are sure about that?

A. Yes.

Q. Then, why is it—are you sure about it, that from the time I talked to you last week, or my brother, until the time you took the stand, nobody else talked to you about this accident?

A. You mean to-day?

Q. Yes.

A. Outside of Mr. Chance.

Q. Mr. Chance spoke to you?

A. Well, he wasn't sitting down——

Q. Did he ask you anything about this accident?

A. Why, no.

Q. What?

A. He didn't ask me.

Q. He said nothing at all about the accident?

A. I just told him how it happened and where I went to. [fol. 60] Q. Did he ask you whether or not you told Mr. Young where you were going?

A. I told Mr. Chance the same thing I told Mr. Young, that I was bound to some beach and I didn't know what beach it would be.

Q. Yes. When I asked you to tell what happened you never told me that you were bound for some beach, but you didn't know what beach it was going to be?

A. I told you I was going to Rye Beach. I went to Rye Beach.

Q. Yes.

A. But I didn't say that to Mr. Young.

Q. You didn't say that to Mr. Young?

A. No, sir. I told him I was bound to some beach, but I don't know where.

Q. Isn't the reason why you changed your story now from the statement that you made because you found out that Rye Beach is in New York State and you didn't want the law of New York State to govern?

Mr. Chance: I object to that question, if your Honor please, because it is too indefinite as to what this change of story is that is alleged.

The Court: I think so.

By Mr. Simon:

Q. Mr. Young asked you where you were going and you said, "To some beach"?

A. Yes.

Q. Did he ask you then what beach?

A. No, sir.

Q. Did he ask you whether the beach was in New Jersey or New York or Pennsylvania or anywhere else?

A. No, sir.

Q. And how long did you take the car for?

A. Practically a day.

Q. Did he ask you how long—withdraw that. Did he [fol. 61] tell you how long you could have the car for?

A. Until the next morning. I returned it to him.

Q. To the next morning?

A. That was Monday morning, yes.

Q. He didn't tell you that you can't go to New York State beach or in New York, did he?

A. Of course, not.

Q. He didn't tell you that you couldn't go to any beach that you wanted to go to, did he?

A. Of course, not.

Q. He told you, after you asked him that you wanted the car to go to some beach, he says you can go where you want to; is that right?

Mr. Chance: I object to it as a leading question.

By Mr. Simon:

Q. What is true, then?

A. Mr. Young loaned me the car, and he didn't ask me to go anywheres I went with it. I just went on my own hook, that is all.

Q. Well, now, you never borrowed Mr. Young's car before that, did you?

A. No, sir.

Mr. Chance: I object to it as immaterial.

The Court: I will sustain it.

By Mr. Simon:

Q. In other words, he gave you permission to take that car for the day, or until the next morning?

Mr. Chance: Well, I object to that. That calls for a conclusion.

A. Yes, sir.

Mr. Simon: That is all.

[fols. 62-72] Cross examination.

By Mr. Chance:

Q. Who sent for you to come up to Dr. Simon's office?
A. Why, I got home—I got home and my wife told me there was somebody wants you to go down to the office, so I went down.

Mr. Chance: That is all.

* * * * * * *

[fol. 73] COLLOQUY

The Court (after reading): Yes, that seems to be clear. The statute in question that affects this case, as I understand it, is Section 59 of the Motor Vehicle Law and the part of Section 59 that applies is: "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner."

That seems to be the——

Mr. Chance: Well, I contend that there is another sec-[fols. 74 & 75] tion, Section 70, and the other provisions than 59, and also 52, which must be read in connection with 59 in order to gather the purpose and purport of the whole thing.

The Court (after reading): Yes. Well, that disposes of that. I will hold that this statute, this portion of the statute, governs in this case.

Mr. Simon: Will it be necessary for me to offer it in evidence?

The Court: Oh, yes.

* * * * * * *

Mr. Simon: I haven't properly offered it in evidence yet, Judge.

At this time I will offer in evidence Section 59 of the Vehicle and Traffic Law as read by your Honor.

* * * * * * *

[fol. 76] Mr. Chance: And I object to it, further, on the ground that it is irrelevant and immaterial to the controversy in this case.

And, further, that to so apply this statute, which has been offered in evidence here, as to subject Mr. Young, who was not in New York, to liability for anything done by Michael Balbino, who was operating Young's car as a mere bailee, would deny to Mr. Young, the defendant, equal protection [fols. 77 & 78] of the laws and take his property without due process of law, in contravention of the Fourteenth Amendment to the United States Constitution.

* * * * * * *

[fols. 79-83] The Court: Now, is there anything more?

Mr. Chance: If it is admitted, I note my exception to the ruling, the grounds of my exception being all those that I have just urged in my statement of why I oppose its admission.

* * * * * * *

[fol. 84] Mr. Simon: I will offer in evidence at this time Section 59——

The Court: It has been offered; he has the record of it. We understood that.

Mr. Simon: There won't be any objection?

The Court: Just mark it in evidence.

Mr. Chance: That has been done.

The Court: It is in evidence and Mr. Chance has his exception; is that correct?

Mr. Simon: May I now read it to the jury? Section 59 of the Vehicle and Traffic Law of New York reads, "Every

owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from the negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner."

[fol. 85] ANTHONY MASCI, sworn.

Direct examination.

By Mr. Simon:

Q. Mr. Masci, where do you live in New York?
A. 2122 LaFontaine Avenue.
Q. New York?
A. Yes.
Q. Now, on August 4th, of 1929, were you anywhere near 183rd Street and Arthur Avenue?
A. Yes.
Q. How far is that from your house?
A. Well, about four blocks, I think.
Q. And what day of the week was it?
A. What do you mean?
Q. What day of the week?
A. Oh, on the 4th of August, Sunday morning.
Q. Sunday morning. About what time, Mr. Masci?
A. About half-past ten or eleven o'clock.
Q. Was the weather clear or cloudy? Was it a nice day or not?
A. Oh, it is a fine day, yes.
Q. And who was with you at that time? Anybody with you?
A. No, all alone.
Q. I see. Well, now, where were you going?
A. I going to buy the paper, because it is Sunday, you know, see.
Q. I see. Well, now, where were you going to cross? What street were you going to cross?
A. 183rd Street and Arthur Avenue.
Q. 183rd Street and Arthur Avenue?
A. Corner of Arthur Avenue.

Q. That is in New York City?
A. Yes.
Q. Do you know anything about directions, east or west or north and south?
A. Well, I know east and west, certainly.
Q. Do you?
A. I know.
Q. I show you some photographs, some pictures.
A. Yes?
Q. Are these pictures of those corners there?
A. Wait, I see.
[fol. 86] Q. Is that the way those streets look?
A. Yes.
Q. Arthur Avenue and 183rd?
A. Yes.
Q. I show you the other pictures. Will you tell us whether or not those are the same streets where the accident occurred?
A. Yes.
Q. That is the way it looked on August 4, 1929?
A. Yes.

Mr. Chance: They are all the same.
Mr. Simon: Just a little different angles. We offer these in evidence. Any objection, Mr. Chance?
Mr. Chance: No.
(Photographs marked Exhibits P-6 and P-7.)

By Mr. Simon:

Q. Well, now, when you were on the corner of 183rd Street and Arthur Avenue what did you do?
A. Well, I wanted to cross the way.
Q. What?
A. I wanted to cross the way, to get to the other side, the other sidewalk.
Q. Well, now, did you look?
A. Certainly, I looked all over, you know, uptown, you know.
Q. What did you see?
A. I had to, naturally, because somebody walking——
Q. Just answer, Mr. Masci. What did you see when you looked?
A. Oh, I saw an automobile.

Q. Yes. And where was this automobile?

A. Well, it is one block, anyhow.

Q. Was it from your left or from your right?

A. On the left side.

Q. And about a block away?

A. Yes.

Q. Well, now, then what did you do?

A. Well, I continued to walk.

Q. All right. Now, did you look again to see this automobile?

A. Certainly.

Q. All right. And where was the automobile when you looked again?

A. I heard it blow.

[fol. 87] Q. He blew his horn, yes. Where was he, how far from you when you saw the man when he blew his horn?

A. Well, five or six foot, like that.

Q. I see. And then what happened?

A. Well, I continued to walk again, you know.

Q. Yes?

A. Because it is not far to go to the other side, see.

Q. Yes?

A. And I don't know—I fall down. Nothing else, I don't know anything else.

Q. From the time that he blew his horn till the time that you were hit——

A. Yes.

Q. —did you see the automobile stop or go slower or go the same speed?

A. No, he going that way (indicating).

Q. He went back and forth?

A. Yes, front back.

Q. Did he stop his car or slacken the speed of his car?

A. Well, no, he didn't stop, because if he stop he don't touch me.

Q. Did he blow his horn again?

A. No.

Q. After the first time?

A. No, no, no, just one time I heard.

Q. When you say he was going this way, show us with your hands again how he was going.

A. Well, that way, you know what I mean (indicating).

Q. Zigzagging?
A. Yes. Maybe he lost control——

Mr. Chance: I ask to strike that out.
The Court: Yes, strike it out.

By Mr. Simon:

Q. You see, Mr. Masci, you can't tell us what was in his mind. Now, you were taken to a hospital, were you?
A. I don't know.
Q. After the accident did you go to a hospital?
A. Yes, because he came in my family right away after that a couple of hours, you know.
[fol. 88] Q. You went to the hospital, Mr. Masci, huh? Just listen to me. They took you to a hospital, did they? The ambulance took you to the hospital?
A. After the accident?
Q. Yes.
A. Certainly.
Q. All right. Well, now, where were you hurt? What parts of your body were hurt?
A. The hospital——
Q. No, please! Where were you hurt? I don't care anything about the name of the hospital. What part of your body was hurt?
A. What do you mean?
Q. Was it your head or chest or leg or where?
A. Oh, on the chest and the leg.
Q. Anywhere else?
A. On the chest, because I remember the blood, you know. I had on a checked suit, you know. I don't use any more because of the blood.
Q. This head of yours, what did they do for your head? What did the doctor in the hospital do to your head?
A. Well, he put stitches in it.
Q. Anywhere else hurt on your head?
A. Yes, sure, yes.
Q. Where?
A. Here, right here (indicating).
Q. Where else on the head?
A. Yes.
Q. How about your mouth?

A. Well, the mouth, before, you know, I had my teeth here, all the teeth, you know.

Q. And the teeth came out?

A. Came out.

Q. All right. What else? Where else were you hurt?

A. Huh?

Q. Where else were you hurt?

A. The leg.

Q. The leg. All right. Talk loud, Mr. Masci.

A. The leg, yes.

Q. Well, now, who was your doctor?

A. Condreras.

Q. And were you in the Columbus Hospital on some big apparatus?

A. Sure.

[fol. 89] Q. All right. After you left the hospital who took care of you? Did the doctor take care of you?

A. No.

Q. Who took care of you?

A. My family, you know, the ambulance.

Q. But I mean you had a doctor, didn't you?

A. Certainly, sure, a doctor from my family. It is a long time I have a doctor.

Q. Yes. You were working for whom, then, before the accident?

A. For nobody—who I worked?

Q. Yes.

A. Oh, for——

Q. Mr. Weber?

A. Weber.

Q. The Fifth Avenue tailor?

A. Yes.

Q. How long had you been working there?

A. About seven years.

Q. You had been working about seven years for Mr. Weber?

A. Yes.

Q. About how much did you earn on the average per week?

A. Not by the week, by piece work.

Q. Well, how much would you earn, about, in a year, a salary of a year?

A. Well, you know, piece work, I make about two coats, sometime three coats.

Q. Yes?

A. And he give, you know, about twenty dollars up.

Q. Twenty dollars up?

A. Twenty-two, twenty-three dollars for one coat.

Q. Well, now, on the average, Mr. Masci, a year how much did you earn or a week or a month? Could you tell us?

A. Oh, a week, maybe sixty dollars, seventy dollars.

Q. Yes. All right. Well, now, since the accident have you done any work at all?

A. No, no.

Q. Why not?

A. I can't.

Q. Why can't you?

A. Because I can't stand up so long, because a tailor, you know, he got to stand up, you know.

[fol. 90] Q. I see. What happens if you stand up?

A. Huh?

Q. What happens if you stand up?

A. What happens?

Q. What happens to your leg if you stand a long time on your leg?

A. Well, both legs I got to stand up, you know, see.

Q. You may sit down, Mr. Masci. If you do stand up for any length of time does anything happen with your leg?

A. No, I can't.

Q. I see. Are you able to walk around all right, Mr. Masci?

A. No, not too much.

Q. Not too much? How much could you walk?

A. Well, one block, two blocks, then I got to sit, you know, because it hurts me.

Q. I see. Well, now, in this tailor business do you use a machine?

A. Certainly, sure.

Q. Why can't you use the machine?

A. No, I can't.

Q. Why?

A. I just try it a couple of months ago, see.

Q. Yes?
A. And I can't do.
Q. You can't do it?
A. No, because, you know, the foot, you know, I got to use the foot, you know.
Q. Got to use the foot?
A. It swells up right away.
Q. Swells right away?
A. Yes.
Q. Did you make or earn any money since the accident?
A. No.
Q. All right.
A. I don't earn no money.
Q. This accident happened August 4, 1929?
A. Yes.
Q. Do you know how much you paid the Columbus Hospital?
A. I don't keep it in my head. I got plenty of bills to give you, but I ain't got them in my——
Q. These bills were paid?
A. Certainly, sure.
Q. All right.
A. I pay every one.

[fol. 91] Mr. Chance: It doesn't make any difference whether they were paid or not. The doctor said they were reasonable.

A. I pay every one. Nobody I owe money to.

By Mr. Simon:

Q. All right, Mr. Masci. What about this mouth of yours? Have you got other teeth put in there since?
A. No. Take me off all the teeth here.
Q. How many were there?
A. All over, see, all over.
Q. I don't hear you?
A. Here.
Q. All right.
A. After I get sick, you know, see.

By the Court:

Q. Which direction were you walking?
A. Huh?

Q. Which direction were you walking? Were you walking north or south or east or west?

Mr. Simon: Show the Judge on the picture.
The Court: That won't help me.

By Mr. Simon:

Q. Will you tell the Judge from what corner to what corner?
A. Yes.

By the Court:

Q. Well, tell me. I can't understand that picture.

Mr. Simon: From what corner?

Q. What street were you walking on?
A. 183rd Street.
Q. 123rd Street?
A. 183rd Street.
Q. You were walking on 183rd Street?
A. Yes.
Q. Going to get a newspaper?
A. Yes, on Arthur Avenue.
Q. And when you got——
[fol. 92] A. On the corner of Arthur Avenue I went to cross ways.
Q. Did you cross Arthur Avenue?
A. No.
Q. Did you cross 183rd Street? Which street did you cross? Arthur Avenue or 183rd Street?
A. 183rd.
Q. You crossed that?

Mr. Simon: East to west. That is from the east corner to the west corner.

A. The west corner.

The Court: Crossed east to west?
Mr. Simon: To the west, yes. I think that is all. Take the witness.

Cross-examination.

By Mr. Chance:

Q. Referring to Exhibit P-6, which one of the streets on this is Arthur Avenue?

A. What do you mean?

Mr. Simon: Arthur Avenue, the street you were crossing.

The Court: No, he was crossing 183rd Street.

A. I was crossing 183rd Street.

By Mr. Chance:

Q. You were crossing 183rd Street?

A. Yes, sure.

Q. All right. Which is Arthur Avenue, anyway?

Mr. Simon: Show the lawyer.

Q. I want you to straighten me out. Which is Arthur Avenue on this picture?

A. That is LaFontaine Avenue, I think.

Q. Where is Arthur Avenue?

A. Arthur Avenue is over here.

Q. Arthur Avenue is the one on which the houses—the two-story buildings at the right of the picture face?

A. Plenty of store over there, plenty of store and plenty [fol. 93] of house, too, on the corner 183rd, see.

Q. Is this Arthur Avenue that runs right along in front of the buildings which you see on the right of the picture?

A. Yes, yes.

Q. And is it Arthur Avenue that continues there across by the——

A. Yes, that is it.

Q. —buildings on the left of the picture?

A. Yes.

Q. In other words, the street that runs almost a straight line across the picture from one side to the other, is Arthur Avenue?

A. Yes, yes.

Q. And Arthur Avenue is the one the automobile was on, is it?

A. (No answer.)

Q. Now, can you tell us where it was on this picture that you left the curb? Does that show?

A. What do you mean?

Q. You walked off the curb some place?

A. Yes, sure.

Q. Where is that on this picture?

A. I went across the way. I went across the way to the other side.

Q. I know, but where is the curb that you left? Did you walk off on this curb or off of this curb?

A. No, off this curb. I started here.

Mr. Simon: Do you want to mark that, Mr. Chance, so the jury will see?

Mr. Chance: It is pretty hard to know just where to mark.

Q. Just show us where you mean.

A. Well, I walked right here.

Q. I don't know. What street is it that is here right in front of this picture? What street is that?

A. I don't know what street it is.

Q. This one, the one down at the bottom.

A. 183rd.

Q. This is 183rd Street?

A. Certainly.

[fol. 94] Q. The place that you started from, then, is this curb where there is a bicycle tire, so you started to cross this way?

A. That is right.

The Court: Just mark that.

Mr. Simon: Put his name on it. The letter M indicates where Mr. Masci left the curb.

By Mr. Chance:

Q. Now, did this car come from your right or from your left?

A. On the left side.

Q. The left side. You didn't see this car was zigzagging before it was six feet away from you, did you?

A. Yes—what do you mean?

Q. I say, you didn't see the car make any zigzag movement until it was six feet away from you, did you?

A. Yes, that is all.

Q. That is all?

A. I see—I see the car from Arthur Avenue before crossed the way, you know, before they crossed. I look up and down to see some car.

Q. Well, did you see this car a block away?

A. Yes, just one block, a little more, too, maybe.

Q. Did you see it all the time from when you first saw it up until the time of the accident or did you look away from it?

A. After the accident——

Q. No, before the accident you looked up the street to your left?

A. Yes.

Q. And you saw this car?

A. Yes.

Q. Now, did you keep looking at it or did you look in the other direction after you saw it from a distance?

A. Well, when I had about half a block, when crossed the way, see, you know what I mean, I went to cross that way.

Q. No, you don't get my question. Sit down.

A. When he was half a block, you know, see, I look again.

Q. Oh, yes, I see.

[fol. 95] A. Naturally, because everybody got to look, because lots of automobiles in the streets.

Q. All right. Now, you saw him a block away?

A. Yes.

Q. Before you looked some other direction?

A. Yes.

Q. Then you looked again, and at that time he was about a half a block away; is that right?

A. No, no, half a block.

Q. No half a block?

A. A little less. A little less.

Q. A little less?

A. More or less, sure.

Q. How far did he travel while you were looking at him that time?

A. About forty or fifty feet, maybe.

Q. You watched him go forty or fifty feet?

A. Yes.

Q. And how far away from you was he then when you were looking at him that time? Was he forty feet away from you?

A. Yes, sure.

Q. About forty feet away from you?

A. Oh, yes, forty or fifty.

Q. Was he going slow then?

A. Well, not very slow and not very fast, either, but I thought I got time enough, you know.

Q. Well, of course, you thought you had time enough, but how far away from him were you when you quit looking at him that time?

A. About forty or fifty feet.

Q. About forty or fifty feet?

A. Oh, yes.

Q. Then when did you look at him again? How far away from you was he when you saw him next?

A. Well, the second time I see forty or fifty, I look.

Q. Yes, but the next time he was—you didn't watch him from then all the way up to when he hit you?

A. No, because I going straight, you know, I thought I could reach, you know.

Q. How far away was he when you saw him next?

A. Huh?

[fol. 96] Q. How far away from you was this automobile when you next saw it for the second time you have told us about?

A. Well, about forty-five feet, like that, you know.

Q. Well, now, from the time he was forty-five feet away up to the time of the accident did you keep on looking at him?

A. Now, you explain me, please. Explain me better.

Q. You say you saw him forty-five feet away?

A. What do you mean? That is the second time I am heard the blow, see.

Q. Forty-five——

A. Forty or fifty feet away, no four—no four feet, you know.

Q. Oh, no forty?

A. Forty, that is all.

Q. Now, what I want to know is, did you keep looking at him from the time that he was forty feet away until the

automobile and you were together? Do you get the question?

(The question was read by the reporter.)

A. Yes, yes, I look, certainly, I looked.

Q. Now, how far away from you was he when you heard the horn blow?

A. That is what I told you.

Q. Forty feet?

A. Yes.

Q. What is your age, Mr. Masci?

A. Huh?

Q. How old are you?

A. Who, me?

Q. Yes.

A. At that time—now I am seventy.

Q. You are seventy years now?

A. Yes, sir.

Mr. Chance: That is all.

Redirect examination.

By Mr. Simon:

Q. Mr. Masci, you were walking from the corner of Arthur Avenue and 183rd to the other corner; is that it?

A. Yes, the other corner.

Q. The opposite corner. And it was ten-thirty or eleven in the morning?

A. Yes, half-past ten or eleven.

Q. A clear day?

[fols. 97-99] By the Court:

Q. And, as I understand it, you were crossing Arthur Avenue and not 183rd Street?

Mr. Simon: Will your Honor permit us to ask the gentleman who is more familiar with these streets?

Mr. Chance: It is pretty hard to tell. They came together.

Mr. Simon: He was crossing Arthur Avenue.

The Court: Yes, because he couldn't cross 183rd Street from east to west.

Mr. Simon: That is right.

By Mr. Simon:

Q. You were on Arthur Avenue?
A. Yes.
Q. When you were crossing?
A. I crossed toward the other side.
Q. Yes, from the corner of Arthur Avenue to the other corner?
A. Yes.

Mr. Chance: I know that is so.

Q. Was there any traffic signal there, any policeman there?
A. No.
Q. Any dummy there, traffic signals?
A. No, sir.
Q. There are now?
A. Over there that is bad, that is very bad.

(Side bar discussion.)

By Mr. Chance:

Q. Were you on the north side or the south side of 183rd Street, do you know?
A. What do you mean?
Q. Before you started to cross Arthur Avenue, do you know whether you were on the north or the south side of 183rd Street?
A. I want to go the other side.

Mr. Chance: That is all.

* * * * * * *

[fol. 100] The plaintiff rested.

[fol. 101] DEFENDANT'S TESTIMONY

CHARLES W. YOUNG, sworn.

Direct examination.

By Mr. Chance:

Q. Mr. Young, you are the defendant, the man being sued in this case?
A. I am.

Q. Where do you live?

A. 27 DeMott Avenue, Clifton.

Q. On the 4th of August, 1929, did you own an automobile?

A. I did.

Q. And did you loan that car to Mr. Balbino?

A. Yes, sir.

Q. Did you know where he was going to take the car?

A. No, I didn't.

Q. Did you ever hear of any—prior to the institution of this suit did you ever hear of any statute of New York relating to the liability of an automobile owner for cars of his which were driven in New York?

Mr. Simon: I object to it as immaterial and irrelevant, as to whether or not he ever heard of any statute.

The Court: How is that relevant?

Mr. Chance: It is relevant upon the question of whether or not he agreed to be bound by any statute of New York.

The Court: I will sustain the objection and allow you an exception.

Mr. Chance: Note my exception.

By Mr. Chance:

Q. You were not present when the automobile was involved in the accident we are talking about?

A. No, sir.

Q. You don't know anything about the accident of your own knowledge?

A. No.

[fol. 102] Q. When the automobile was out on that day, the 4th of August, 1929, was it on the road for any purpose of yours?

A. No, it wasn't.

Q. Was Mr. Balbino in your employ?

A. No.

* * * * * * *

Cross-examination.

By Mr. Simon:

Q. Where did Mr. Balbino see you that day or the day that you arranged to let him take this car?

A. He made arrangements on Saturday afternoon.

Q. He had come over to your place of business on Saturday afternoon. Just what did he say to you?

A. He asked me if he could borrow this car for tomorrow; he wanted to go for a ride—he wanted to know if he could borrow the car for Sunday; he wanted to take his family for a ride.

Q. And you didn't ask him where he wanted to go?

A. No, I didn't ask him where he was going or anything.

[fol. 103] Q. And did you tell him when you wanted this car returned?

A. Well, I think I told him—no, I think he told me he would bring it back Monday morning.

Q. You had no objection, of course, to that, did you?

A. No.

Q. Though you say he didn't tell you where he was going and you didn't ask him?

A. No.

Q. All he asked was for the loan of the car for a day and you said that is all right, take it?

A. Yes.

By the Court:

Q. It was just as a favor; is that it?

A. Yes.

By Mr. Simon:

Q. Mr. Young, do you remember Mr. Irwin Simon coming over to see you?

A. Yes.

Q. Just answer yes or no.

A. Yes.

Q. And at that time—just answer this yes or no—did you or did you not tell him that Mr. Balbino told you he was going to Rye Beach, New York?

A. No, because I didn't know it.

Q. Well, how long ago was it when he came to see you?

A. I think it was some time in December.

Q. Of this last year?

A. Of 1929.

* * * * * * *

[fol. 104] LENA BALBINO, sworn.

Direct examination.

By Mr. Chance:

Q. Mrs. Balbino, you are the wife of the gentleman who was on the witness-stand yesterday?

A. Yes.

Q. You were in the automobile that we are talking about here when the accident happened, weren't you?

A. Yes, sir.

Q. Did you see Mr. Masci before the accident?

A. Well, I seen him about forty feet away.

By the Court:

Q. Speak out loud so they can hear you?

A. I seen him about forty feet away. He was just going to cross the curb.

By Mr. Chance:

Q. Now, where were you seated in the automobile?

A. I was sitting in the back.

Q. Talk up louder.

A. In the back of the car.

Q. And who else was in the car?

A. My mother and my father and the children.

[fol. 105] Q. They are quite elderly people, are they?

A. Yes, sir. My mother is sick.

Q. Your mother is sick?

A. Yes, sir.

Q. They too sick to come to court?

A. Yes, sir.

Q. Now, on this day as you were going along—do you know what street it was you were on just before the accident?

A. Well, I just don't know. I don't know nothing about New York, see.

Q. Well, anyhow, you were going along some street?

A. Arthur Avenue, I think.

Q. Before this accident?

A. Yes.

Q. And as you were going along there were you going fast or slow?

A. No, sir. About fifteen or twenty miles an hour.

Q. And did this gentleman blow his horn?

A. Yes, sir, he did.

Q. And you said you saw Mr. Masci about forty feet away?

A. Yes, sir.

Q. Well, now, tell the jury just how Mr. Masci acted from the time that you saw him forty feet away up until the time of the collision.

A. Well, he seen my husband blow the horn and he stopped.

Mr. Simon: I ask that it be stricken out.

A. And we were going further up and he stopped again. He didn't know which way he was going; he just got puzzled. He puzzled my husband, and he was going so nervous he fell on the car. My husband stopped and he fell on, right over the car, see; he just didn't know which way he was going.

Q. Well, now, what part of the car was it that the gentleman came in contact with?

A. The front, just the front.

Q. How far did the car go from the time that the man fell against it until it stopped?

A. Very slow it was going.

Q. Do you know how far it went before it stopped?

A. No, I don't just remember.

[fol. 106] Q. Was it a long distance or short?

A. I just don't remember, see.

Q. What is that?

A. I just don't remember that.

Q. When the accident happened you sort of forgot what else was going on?

A. I got nervous, that is what I did.

Q. Well, now, when was the act of the man in stopping with regard to the time the horn was blown? Was that after or before your husband blew the horn?

A. I don't remember.

Q. Your husband blew the horn, didn't he?

A. Yes, and then he stopped.

Q. It was then that the man stopped?

A. Yes, sir.

Q. And then what did your husband do?

A. Well, he stopped the car.

Q. And did Mr. Masci head toward the curb or toward the middle of the street right after your husband blew the horn?

A. He headed for the middle of the street.

Q. How far would you say Mr. Macsi went between the time that he started to make this back and forth movement that you are talking about, to the time the two cars came together, or the man and the car came together?

A. Well, he wasn't very far from the curb.

Q. How far would you say Mr. Masci was from the side of the street when you first noticed him?

A. Well, he was crossing, see.

Q. I know, but how far from the curb?

A. I couldn't tell you how far he was.

Q. Well, was he halfway across the street or quarter of the way? I don't mean in feet; I mean comparatively how much of the street had he gone over?

A. I just don't know.

Q. You don't know?

A. I don't know. I was in the back seat; I didn't see.

[fol. 107] Q. Just tell us what you do know about this thing. Tell us everything you saw?

A. Well, I seen the man. He just didn't know which way he wanted to go. First he went back, then he went forth. He seen the car coming. My husband blew the horn. He just didn't know which way. He was going back and forth. First he would go back and then he would go forth again. My husband blew the horn. He didn't just know which way he was going and he puzzled my husband up so that when my husband did stop, why, he fell right over the car.

Q. In other words, you say the car was stopped when the man ran into it?

A. Well, my husband just stopped when he just ran into him, see.

Mr. Chance: All right, cross examine.

Cross-examination.

By Mr. Simon:

Q. Why, Mrs. Balbino——

A. Yes.

Q. —you don't mean to say that the car was stopped when this accident happened?

A. When he bunked into him my husband stopped right away. He bunked into the car.

Q. Right after the accident your husband stopped?

A. No, he didn't right stopped just that minute when he fell right onto the car. He didn't know which way he was going, so my husband stopped and he went right into the car, that man did.

Q. Well, now, are you familiar with that neighborhood there?

A. No, I don't just know nothing about New York.

Q. Did you know the corner Mr. Masci got off from?

A. No.

Q. He was walking from one corner of the street to the other?

A. Yes, from this side to the other side.

[fol. 108] Q. And was the road clear?

A. I don't remember about the road.

Q. I mean, were there any cars coming in the opposite direction, did you know?

A. Sure, there was cars going forth and back.

Q. You were looking straight ahead, were you, right along?

A. Well, I don't know about that, because I don't remember if I was looking straight ahead.

Q. When you saw this gentleman forty feet away, of course, you were looking straight ahead, weren't you?

A. Well, I seen him—my husband was blowing the horn; that is why I seen him.

Q. So that when you saw him the first time he was forty feet away?

A. Yes.

Q. Did you look through the front of the car before that?

A. No, I didn't look in the front.

Q. So that the first time you looked on the front of the car was when this man was forty feet away from you?

A. Yes.

Q. Did you—at that time was he near the center of the road or where was he?

A. I just don't remember where he was. He was going across.

Q. Can you give us any idea whether he was near the curb or midway of the curb or past?

A. No, I don't remember about that. I just didn't take notice of it.

Q. What side of the street was your car being driven on?

A. On the right side.

Q. All right. Can you tell us, when this car was forty feet away from him, whether the gentleman was directly in front of your car?

A. Yes, sir.

Q. So that when this man was forty feet away, that gentleman was right in front, forty feet ahead?

A. Yes, yes.

Q. Then what did you see your husband do?

A. Well, my husband—he puzzled my husband, the man did; he didn't know which way he wanted to go.

[fol. 109] Q. All right. When did you see then Mr. Masci do, when he was forty feet in front of your car?

A. He stopped.

Q. This man stopped?

A. Yes.

Q. Now, when this man stopped——

A. Then he went and walked again.

Q. Just a minute, please. Mrs. Balbino, when this man stopped——

A. Yes.

Q. And your car was forty feet from him, what did your husband do?

A. My husband stopped, too.

Q. Oh, I see. So that when this man stopped when he was forty feet away from you, your husband stopped; is that right?

A. He blew the whistle and went ahead. He thought the man was going to stop——

Mr. Simon: I ask to have it stricken out, what he thought.

Q. You see, Mrs. Balbino, when you saw this man forty feet in front of your car, you say this man stopped; is that right?

A. Sure, he stopped.

Q. He stopped?

A. He seen the car coming.

Q. Was he stopped in the middle of the street?

A. Yes.

Q. What did your husband do?

A. Well, my husband was going on up.

Q. So while this man stopped your husband kept on going?

A. Yes, sure, because——

Q. Don't say because. That is so, isn't it? This man stopped and your husband kept on going?

A. Yes.

Q. Then what did the man do then?

A. I don't remember that.

Q. Well, was the man stopped when he was struck?

A. I don't remember that. I was in the back of the car. [fol. 110] Q. I see. How fast, Mrs. Balbino, would you say your car was traveling when Mr. Masci was struck?

A. My husband was going very slow up that street.

Q. About how fast?

A. I don't just know how fast. About fifteen miles.

Q. So that at the time Mr. Masci was struck the car in which your husband was driving was going about fifteen miles an hour?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. How fast was he going before that?

A. Fifteen to twenty; that is all.

Q. Fifteen to twenty. So that before that, at a distance of a block before that, the car was going fifteen to twenty miles an hour?

A. That is all.

Q. And at the time this man was struck it was going about fifteen miles an hour?

A. Yes, sir.

Q. I see. Now, your husband didn't stop his car from the time that this man was forty feet away from you till the time he was struck, did he?

A. I don't know about that.

Q. Well, would you remember whether he stopped?

A. No, I just don't remember about that.

Q. All you can tell us, then, is that when you saw this man forty feet from you——

A. Yes.

Q. —your husband was going about fifteen miles an hour at that time?

A. Yes.

Q. And at the time he struck him he was going about fifteen miles an hour?

A. Yes.

Q. And then he stopped right after that, didn't he?

A. Yes.

Q. And you say that part of the car struck this man.

A. The front.

Q. The front of the car?

A. Yes.

Q. Isn't it true, Mrs. Babilno, that Mr. Masci was more than halfway across the intersection when he was struck?

A. I don't know anything about that.

[fol. 111] Q. I see. Isn't it true that Mr. Masci became confused and zigzagged that way?

A. No.

Mr. Chance: I object to that. She doesn't know whether he became confused or not.

A. He puzzled my husband up, didn't know which way he was going.

Q. You say he puzzled your husband?

A. Yes, he did.

Q. So when he puzzled your husband——

A. Yes.

Q. —he went this way, did he?

A. No, my husband didn't go that way.

Q. Tell us how he went.

A. My husband stopped. He puzzled my husband and my husband stopped the car.

Q. Well, where was the—how far from your husband was he from this intersection——

A. I seen my husband stop. I wasn't looking at the man then.

Q. What we want to know is this: Your husband became puzzled, you say?

A. Yes, he puzzled my husband up.

Q. Yes. And how far away was he from your car when your husband was puzzled?

A. I don't think he was very far from the car.

Q. How far, about?

A. I don't know anything about that.

Mr. Chance: I object to that. She don't know anything about it.

Mr. Simon: Let her say so. It is cross examination; let her say so.

A. I don't know.

The Court: She said she can't tell.

A. I told him that he puzzled my husband up and I was in the back. I didn't see much.

By Mr. Simon:

Q. Well, do you know, Mrs. Balbino, where it was that your husband became puzzled? How far from this [fol. 112] man?

A. I just don't know anything about that.

Q. From the time that your husband became puzzled until the time that this man was struck how did your husband continue?

A. I don't remember that.

Q. You don't remember?

A. No.

By the Court:

Q. Well, how did he puzzle your husband? What did he do?

A. He was going forth and back. He didn't know which way he wanted to go, if he wanted to cross or didn't want to cross. He was going back and forth.

Q. How do you know that?

A. I seen the man and I didn't look any more.

Q. But you tell us you don't know what part of the road he was in?

A. He was going across, I am telling you.
Q. How far over was he?
A. Near halfway.
Q. Was he halfway across?
A. Going that way.
Q. Was he halfway across when you were forty feet away?
A. I don't know about that.
Q. Well, now, you don't remember. You say the man was puzzled and then you tell us you don't remember.
A. I seen my husband when he just got near the man, my husband got nervous, too.
Q. Well, you say the man was puzzled. What did he do that he was puzzled?
A. He didn't know which way he was going.
Q. What did he do that made you believe that?
A. He stopped and went forth. First he went forth and back again, see.
Q. He walked forward and back?
A. Yes.
Q. Well, how many times did he do that?
A. About three times.
Q. Three times he walked forward and back?
A. Yes.
[fol. 113] Q. And how far forward did he walk and how far backward did he walk?
A. I couldn't say.
Q. Now, you are telling us. Nobody else knows but you.
A. I know I seen the man, because my husband blew the horn.
Q. You saw the thing and know what it is about. Why don't you explain it to us?
A. He went five feet back and when he wanted to cross again, see, and he couldn't cross, because he seen the car, see.
Q. Well, was there other traffic?
A. There wasn't no other traffic.

The Court: All right.

By Mr. Simon:

Q. And when Mr. Masci was doing all this——
A. Yes?
Q. —what was your husband doing?

A. I don't know.
Q. Kept on going?
A. He was going slow.
Q. Kept on going slow?
A. Yes.
Q. While Mr. Masci was walking forward and backward that way, as you illustrate, three or four times, your husband kept on going, didn't he, at the rate of fifteen miles an hour?
A. He was going very slow, I am tell you.
Q. You say at the rate of fifteen miles an hour?
A. Very slow.
Q. Who else, Mrs. Balbino, was sitting in the front with your husband?
A. My father.
Q. Your father?
A. Yes.
Q. So just the two was in the front and you were in the rear with your mother?
A. Yes.
Q. And you saw this while looking——
A. From the back.
Q. You saw this in the back looking between your husband and your father?
A. Yes.
Q. This is the first time, is it not, that your husband ever drove a pleasure car?
A. Yes, sir.
[fol. 114] Q. I see. Your husband is here in court, that gentleman in the last row?
A. Yes, I see him.

Mr. Simon: That is all.

MICHAEL BALBINO, recalled.

Direct examination.

By Mr. Chance:

Q. Mr. Balbino, you were driving the automobile in question along Arthur Avenue, weren't you, before the accident?
A. Yes, sir. Yes, sir.

Q. When you came to the intersection there, where East 183rd Street and Crescent Avenue and East 184th Street all come together, did you see the plaintiff, Mr. Masci?

A. Yes, sir.

Q. Did you blow your horn?

A. Yes, sir.

Q. How far away from him were you when you blew the horn?

A. Practically about forty feet.

Q. Now, tell the Court and jury what he did, that is, what Mr. Masci did from the time you blew your horn until the time that Mr. Masci and the automobile were together?

A. I was going down Arthur Avenue and I saw him within forty feet, and I wanted to make a right-hand turn to hit the Boulevard to go down to Rye Beach, so he saw me. He simply walked straight ahead, didn't look either back or forth, and he just hesitated like a rubber ball on me, and he started over again, and he puzzled me again and I came in contact with him, and that is how it happened.

Q. Well, now, I am afraid we don't know just exactly what you mean by acting like a rubber ball. Just tell us what you mean by that. How did he manoeuvre that you say was like a rubber ball?

A. Well, I finally got close to him and he shifted from one side to the other. He would tremble, like, puzzled me, shivvered.

[fol. 115] Q. How far did he move any time that he was going like a rubber ball?

A. You mean back and forth?

Q. Yes.

A. Not very far. We will say about a foot—not so far.

Q. Looked one way——

A. Looked one way and then he went on in front of me again.

Q. Suppose you stand up and go through one of the rubber ball manoeuvres.

A. (The witness complied.)

Q. How did he go?

A. Well, we will say this is Arthur Avenue and 183rd Street. He was crossing the street and I am coming down blowing my horn, and he kept on walking, didn't look forth

or back if a car was coming or not, and I give him the horn and he got excited.

By the Court:

Q. What did he do? Explain it.

A. As I got close to him he went back and then back to me again and he went back and he hooked the headlights of my machine.

By Mr. Chance:

Q. All right, go back on the stand. Now, at the time that he got through these manoeuvres to the time he hooked your head lamps, how fast were you going then?

A. Fifteen.

Q. At the time of the actual point of contact, I mean.

A. You mean when I contacted with him?

Q. Yes.

A. After I hit him?

Q. When you hit him.

A. I stopped right there.

Q. And how fast had you been going as you were coming up the street there? For instance, when you blew your horn.

A. You mean before the accident?

Q. Yes.

A. Fifteen miles an hour.

[fol. 116] Q. And between the time that you were blowing the horn the first time you told us about and the time when the man was up against the front of your car there——

A. Yes?

Q. —had your speed been the same?

A. Why, it wasn't the same, but I had my foot off the gas and she was just rolling. Arthur Avenue is a sort of a little hill coming down.

Q. Well, when was it that you applied the brakes? Did you apply the brakes before you hit him or——

A. Well, I was going slow. I had my foot on the brake, but I didn't have it down full.

Q. You say he ran into you or you ran into him?

A. Well, we both contacted.

Q. I see. And how far did you go ahead from the moment of contact till when you were actually at a stop?

A. You mean after I hit him?

Q. Yes.

A. I stopped and picked him up.

Q. How far was he away from the curb?

A. Why, I figure about not quite halfways.

Q. Do you know whether at the time he happened to get against the car that he was faced back toward the curb he had started from or faced the other way?

A. No, facing going across the street, crossing Arthur Avenue.

Q. Well, these manœuvres that you have told us about were out there in the middle of the street, then; is that right?

A. (No answer.)

Mr. Chance: That is all. Cross examine.

The Court: We will take a recess until 1:30.

(Recess to 1:30 o'clock p. m.)

Afternoon Session, 1:30 P. M.

MICHAEL BALBINO, resumed.

Cross examination.

By Mr. Simon:

Q. Mr. Balbino, it was testified this morning that Mrs. Balbino, your wife, and mother-in-law were in the rear of [fol. 117] car; is that right?

A. Yes, sir.

Q. Wasn't there anyone else in the rear of the car besides your wife and mother-in-law?

A. My kids.

Q. Your kids?

A. And my brother-in-law.

Q. And your brother-in-law. So that there is how many in the rear of the car?

A. Five.

Q. Five. Now, did I understand you to say this morning on direct examination by your counsel that you were going to make a right turn?

A. Yes, sir.

Q. What is that?

A. Yes, sir.

Q. A turn into what street?

A. 183rd Street.

Q. So it was your intention at that corner where the accident happened to make a right turn to 183rd Street; that is right?

A. Yes, sir.

Q. Well, now, are you sure about that, that you were going to make a turn?

A. Yes, sir.

Q. And why?

Mr. Chance: I object to it as immaterial—why.

Mr. Simon: All right, withdraw that.

By Mr. Simon:

Q. You say, now, that you were going to make a right turn?

A. Yes.

Q. You are sure about that?

A. Yes.

Q. You remember, do you not, in my offices giving some testimony and Mr. Shaw, that gentleman, the stenographer here now, was the gentleman who took the testimony, this same gentleman?

A. I don't recall.

Q. Well, do you remember you were asked some questions and some answers were given? Is that right?

A. Yes.

Q. You were asked at that time—the question was. "You were making a turn east?" Your answer, "No, I was going to keep on. I was going on Arthur Avenue." Which is correct?

A. I don't recall that.

[fol. 118] Q. That you were going to keep on or you were going to turn?

A. I don't recall that.

Q. You don't recall what?

A. I was making a right-hand turn, hitting for the Boulevard.

Q. Well, now, when you testified—when you were asked this question in March of last year, almost a year ago, and your answer was, "No, I was going to keep on Arthur Avenue," was that answer at that time correct or not?

Mr. Chance: I don't know what this testimony is.

A. No, I don't remember.

Mr. Chance: What is this?

Q. You were asked that question, weren't you, in my office?

A. Yes, sir.

Q. You don't remember this answer?

A. I remember making a right-hand turn on 183rd Street on Arthur Avenue.

Q. Do you now say that you didn't say, "I was going to keep on Arthur Avenue"?

A. I don't recall it.

Mr. Chance: Well, I object to the use of some examination which we are not given any particulars of as to what it is.

Mr. Simon: Testimony taken in my offices.

Mr. Chance: In what case?

Mr. Simon: That wouldn't make a bit of difference. His testimony in the case of Masci against Balbino where he was a defendant.

By Mr. Simon:

Q. Now, where did you first see this man? How far was he from you?

A. Within forty feet.

Q. And on what side of the road were you then?

A. Right-hand side of the road.

Q. And when he was forty feet from you on the right-hand side of the road was he directly in front of your car [fol. 119] or where?

A. No, sir.

Q. Where was he then?

A. He was just about to cross off the pavement.

Q. I see. So that the first time that you saw this man was just about off the pavement?

A. Yes, sir.

Q. How many feet would you say he was from the curb then?

A. About four feet.

Q. Four feet?

A. Yes, sir.

Q. Are you sure about that?

A. Well, I am just guessing at it, but two years ago I can't remember all them things.

Q. You can't remember?

A. No, sir.

Q. Isn't your memory clear now where you first saw this man when you were forty feet from him?

A. I told you I saw him forty feet.

Q. Yes.

A. Within that spot.

Q. And where was he then?

A. Three foot off the corner.

Q. Are you sure about that?

A. As I got closer to him he was walking.

Q. And when you first saw him he was just three feet off his corner?

A. Three foot off the pavement.

Q. He wasn't in the middle of the crossing?

A. No, sir.

Q. Then you were asked this question: "And was this man at the crossing?" Answer, "He was halfway, yes." What did you mean then when you said a year ago that he was halfway across?

A. Halfway across the Street?

Q. Yes. Is that answer right or is your answer to-day right?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. That is your answer to-day? You mean you don't remember whether he was three feet off the curb or whether he was halfway across? You don't remember?

A. No, sir.

[fol. 120] Q. Well, now, are you sure now, then, that you were forty feet away when you first saw him?

A. Yes, sir.

Q. Well, now, that road is about how wide, Arthur Avenue?

A. Well, it is a pretty wide road.

Q. Could you give us——

A. Enough for about three machines to go through.

Q. And it was a clear day, was it?

A. A clear day.

Q. So there was nothing to prevent you from looking ahead, was there?

A. I did look ahead. I did.

Q. Yes. Well, could you tell this Court why it was that you didn't see this man until you were forty feet away from him on a bright, clear day, on a broad avenue?

A. I saw the man within forty feet, I told you, and as I was riding down he got closer to me.

Q. Now, tell us, Mr. Balbino, why it was, if it was a clear day and a broad avenue, why you didn't see this man before he was forty feet in front of you.

A. I didn't hit him within forty feet.

Q. What is that?

A. I hit him when I got close to him.

Q. Mr. Balbino, maybe I don't make myself clear. You said the first time you saw this man was forty feet away.

A. Forty feet.

Q. And it was a clear day?

A. That is, before I got to that corner.

Q. Yes. Well, tell us why didn't you see this man, then, before you were forty feet away from him. Why didn't you see him when he was eighty feet or a hundred?

A. From that corner to 183rd Street is a triangular corner.

Q. Yes?

A. It is less than forty feet.

Q. You mean from Arthur Avenue where you were traveling on to the next corner where you were coming from is only forty feet?

[fol. 121] A. Have you got the diagram there?

Q. This doesn't show all of Arthur Avenue?

Mr. Chance: What is that? The picture?

Mr. Simon: Yes.

Q. You haven't got the full particulars on Arthur Avenue.

Q. Do you mean to say, then, that the first time that you saw this man was forty feet away, and because you couldn't see him before that——

A. I saw him first I was going down, as I was riding down, as he got off the pavement.

Q. All right, forty feet away. But why didn't you see him when you were a hundred feet away?

A. A hundred feet?

Q. Yes.

A. I am telling you from corner to corner on 183rd Street it is not forty feet; it is a triangular corner.

Q. You were riding on Arthur Avenue, weren't you?

A. Yes, I was riding on Arthur Avenue.

Q. Yes, and you were going what direction?

A. East.

Q. East?

A. East, for the Boulevard.

Q. Isn't there a very long block to where you get to 183rd Street and Arthur Avenue?

A. It is not very long.

Q. Not very long?

A. It is not very long, because there is another street in between that and 183rd Street.

Q. Well, how far is that away from 183rd Street?

A. Well, that is——

Q. When have you been there the last time?

A. When I have been on that corner the last time?

Q. Yes, yes.

A. That is the first time I have been there with that car.

Q. But have you been there since the accident?

A. Have I been there since the accident?

[fol. 122] Q. Yes.

A. Why, I was down there with Mr. Young to show him where the accident happened.

Q. Don't you know that is a very long block until you get to 183rd Street and Arthur Avenue?

A. Before 183rd Street?

Q. Before you get to the corner it is a very long block, isn't it?

A. There is several houses there and there is lots of streets cut into triangles.

Q. Before you get to the corner where the accident happened?

A. Arthur Avenue is a long street, yes, it is.

Q. Yes. So that you were a good distance away from 183rd Street at one time, weren't you, on Arthur Avenue?

A. Right up on the next corner.

Q. Well, now, did you see him at that time?

A. Did I see him at that time?

Q. Yes.

A. No.

Q. So you didn't see him until he was——

A. Until I got close to him.

Q. Forty feet away, and at that time you say he was how far?

A. When I hit him?

Q. Yes.

A. Not very far.

Q. How far?

A. Within about six or seven feet.

Q. From the curb; is that right? Is that right?

A. I was close to him. I was close to him with my machine at that time. Not from the curb.

Q. How far was he from the pavement when you struck the man?

A. I told you about three foot.

Q. Three foot. Three foot is where you first saw him, you said.

A. That is where I first saw him.

Q. How far was he when you struck the man?

A. How far was the man out?

Q. Yes.

A. Well, figure about four or five feet.

Q. All right. Now, you are sure about that, aren't you? You are sure about that?

A. As far as I could remember.

Q. Isn't your memory clear to-day?

A. I don't know.

[fol. 123] Q. You don't know? Do you remember being asked this question: "How far from him were you when you first saw this man?" Answer, "Twenty feet."

A. I told you—twenty feet?

Q. Yes. Did you say that?

A. When I first saw that man?

Q. Yes.

A. Twenty feet?

Q. Yes.

A. Then I wasn't a block away, as you say.

Q. No, Mr. Balbino, I am only asking you which is true, that you were twenty feet——

A. I am telling you the way it happened, Mr. Simon.

Q. How close do you say you were now to the man? Twenty feet or forty feet?

A. Do you mean the time that I hit this man?

By the Court:

Q. No, when you first saw him.
A. When I first saw him was in forty feet.
Q. Not twenty feet?
A. No, sir, as far as I could remember.

By Mr. Simon:

Q. Well, then, this answer isn't correct when you said the first time you saw the man was twenty feet from you?
A. No—well, I wouldn't say it is correct or it is not correct.
Q. And when you were asked this question, was the man at the crossing, you said he was halfway across. That is not true, then, is it?
A. Well, anything like that you couldn't really say if he was half across or started from the pavement about a month later. I couldn't remember all them things.
Q. If you can't remember whether he was half-way across or three or four feet across, then why do you want to tell us, then, how far he was?
A. He wasn't halfway across, because Arthur Avenue is a wide block.
[fol. 124] Q. If he wasn't halfway across, why did you say so in March of last year, that he was halfway across?
A. (No answer.)
Q. Did you swerve your car at all before you struck this man?
A. What was that?
Q. Did you swerve your car at all before you struck this man?
A. What do you mean by swerving?
Q. You don't understand what I mean by swerve?
A. Give it to me clear, please.
Q. All right. Did you turn your car left or right or go straight?
A. I went straight ahead.
Q. Then, you were asked this question: "What did you do as you got near this man, if anything"——
A. I blew my horn.
Q. No, you were asked that and you said, "What did I do? I blew my horn and the man puzzled me and I tried

to avoid it on my left when the right side of my car got him and knocked him down.

"Q. You mean you swerved your car to the left?"

"A. Yes."

Now, is it true that you swerved your car or you went straight?

A. I was going straight ahead.

Q. Well, then, you didn't swerve your car?

A. I didn't zigzag my car at all.

Q. You didn't turn left, then, did you?

A. I didn't turn left or right. I hit the man and I stopped and picked him up.

Q. So that answer is wrong, too, when it says you swerved left and then hit this man? That is not correct, is it?

A. I am not going to say if it is correct or not.

Q. Well, if it is not correct—if you don't remember, you tell us, rather than answer, you say you don't remember.

A. It is quite a ways back. I couldn't remember them things.

Q. Were the brakes in good condition?

A. Yes, sir.

[fol. 125] Q. You were asked this question: "Were the brakes of this car in good condition?

A. I didn't test them out that day.

"Q. You didn't test them? A. I didn't test them. He just gave me the car like that."

A. I am not a mechanic, so I didn't test the brakes.

Q. Well, were they in good condition?

A. They were in good condition.

Q. "Q. Then, you say, you didn't test the brakes of this car before the accident?

A. No, sir.

"Q. So you don't know whether or not they were in good condition or not? A. No."

That is correct, that you didn't know whether they were in good condition?

A. I didn't examine the brakes; I simply took the car and went that morning.

Q. Didn't you at any time apply the brakes, then, before the accident?

A. Before the accident?

Q. Yes.

A. Yes.

Q. Then you ought to have known whether they were in good condition?

A. Well, they were in good condition.

Q. Then, why did you say, then, when you were asked that question whether they were in good condition, you said you didn't know?

A. They were good enough to stop on the corner every time I tried them.

Q. Now, where was this man lying when you stopped your car?

A. You mean laying after I hit him?

Q. Yes.

A. You mean after the accident?

Q. Yes.

A. Well, I was inside, and I couldn't tell you which side of the road he was laying.

Q. You got out of your car?

A. I got out of my car, yes.

Q. Where was he lying?

A. Why, he was laying right in the street.

Q. Out in the street. Well, in front of the car?

[fol. 126] A. In front of the car, of course.

Q. So you didn't have to back up your car, then, did you?

A. Did I have to back up my car?

Q. Yes.

A. I stopped—did I have to back up my car?

Q. Did you, when he was laying there in front of the car?

A. Let's see. I think I did.

Q. You aren't sure about that, either, are you?

A. If I backed up my car or not?

Q. Yes. You don't know that?

A. Well, I don't remember that.

Q. All right. How fast were you traveling when you blew your horn fifty feet before that?

A. Fifteen miles an hour.

Q. How fast were you traveling at the time that this man was struck?

A. Fifteen miles an hour.

Q. How fast were you traveling before that?

A. Before I hit this man?

Q. Before, yes.

A. The same rate.

Q. So that from the first time—withdraw that. How fast were you traveling when you got on Arthur Avenue, just a block before that?

A. Before the accident?

Q. Yes.

A. The same rate.

Q. So that from the time you go on Arthur Avenue to the time you blew your horn——

A. Yes.

Q. —and the time this man was struck, you kept on going fifteen miles an hour?

A. Yes.

Q. So you didn't slacken your speed before this man was struck?

A. No.

Q. And you didn't stop your car before this man was struck?

A. Of course, I didn't; I went right ahead.

Q. Well, did this man appear to you to be puzzled?

A. Yes, sir.

Q. And when he was forty feet away from you did you realize that he was puzzled?

A. Well, no, not when I was forty feet away from him. [fol.127] When I got close to him, within six feet, six or seven feet, that is when the old gentleman puzzled me.

Q. When he was six or seven feet away from you you were puzzled?

A. Yes, sir.

Q. Then what did you do?

A. I blew my horn more than twice and he just hooked my headlights and down he went.

Q. Yes, and where, then—now, for the last time, where was he in the road when he was struck?

A. You mean where he was lying?

Q. Yes.

A. Why, right in the center of the road.

Q. In the center of the road?

A. I mean in the center of the street. Of course, it wouldn't be near the curb where I struck him. I couldn't move the car over or I couldn't move him over.

Q. Mr. Balbino, where was it in relation to the road that you struck this man? Near the curb or in the center or on your left side of the road?

A. You mean when I struck him?

Q. Yes.

A. Well, I don't remember if it was the center or what. I don't remember.

Q. Why don't you?

By the Court:

Q. Where was your car?

A. My car was on the right-hand side, sir.

Q. That is what he is asking you. He is asking you where your car was when the accident took place. Was your car near the curb?

A. Well, it wasn't quite near the curb. I should judge about six feet from the curb.

Q. Six feet from the curb?

A. Yes

By Mr. Simon:

Q. How wide would you say Arthur Avenue is, about?

A. Well, enough for about three cars to go through or more.

[fol. 128] Q. What would that be? About how wide?

A. Well, say about forty-five or fifty feet.

Q. About forty-five to fifty feet, the whole width of the road?

A. I guess so.

Q. And you were about five or six feet from the right curb when this man was struck; is that right? You were asked this question: "Where was he struck on the street?" Your answer is, "He was struck right in the middle of the street.

"Q. In the middle of what street? A. In the middle of Arthur Avenue."

Is that true, that he was struck in the middle of the street, or right near the right curb?

Mr. Chance: Now, I object to this reading of certain document that is not in evidence, some document concerning the authenticity of which there is no proof, concerning which there is no way of knowing whether it was a judicial proceeding or some kind of a private conference, or just what kind of a performance this was, or whether it was under oath or not.

The Court: I will overrule the objection and allow you an exception.

Mr. Chance: Exception.

By Mr. Simon:

Q. Which is true? When you stated in March of last year that the man was struck in the middle of the road or when you now state that the man was struck five or six feet from the right curb?

A. I couldn't——

Mr. Chance: I object to that question.

A. I couldn't remember.

Mr. Chance: —because it contains an unwarranted assumption of fact, concerning which there is no evidence that he did say such a thing last March.

Mr. Simon: I will put it to him this way:

[fol. 129] Q. Do you remember being in the offices last March, March 29, 1930, and Mr. Shaw was there taking testimony, this gentleman?

A. Yes, sir. I don't remember him, though.

Q. I beg your pardon?

A. I said I don't recall him.

Q. You remember you were asked this question: "Where was he struck on the street?" and your answer was, "He was struck in the middle of the street"? Is that the correct answer or not?

A. No, sir.

Q. That is not correct? What is correct, then?

A. Within six or seven feet from the curb.

Q. So that—and then you were asked, "In the middle of what street?" and your answer was, "In the middle of Arthur Avenue." That is not correct?

Mr. Chance: I object.

A. You couldn't figure twenty feet the middle of Arthur Avenue, though. It is about sixty feet in width.

Q. What a minute.

Mr. Chance: I object because there is no evidence that he said anything of the kind.

The Court: I will permit it.

Mr. Chance: Where is the evidence?

The Court: Six or seven feet from the curb.

Mr. Chance: No, the other part there, that—as to what he said last March, whatever the date was.

By Mr. Simon:

Q. You were asked last March, "Where was he struck on the street?" Did you answer then, "He was struck right in the middle of the street"? Is that correct or not?

A. I don't remember.

[fol. 130] Mr. Chance: The point I object to is that statement that you were asked last March. There is no evidence that he was asked anything of the kind.

By Mr. Simon:

Q. Well, do you remember being asked this question last March in my office and Mr. Shaw was taking the testimony, "Where was he struck on the street"? Do you remember being asked that question?

A. You asked me a question like that, yes. Yes, you did.

Q. All right. Do you remember answering it this way: "He was struck right in the middle of the street"?

A. I don't recall it.

Q. You don't remember that?

A. No, sir.

Q. Do you also remember then being asked, "In the middle of what street?" and your answer was, "In the middle of Arthur Avenue"?

A. I didn't measure that street.

Mr. Chance: I make the same objection. There is no evidence——

Q. Were you asked that question, "In the middle of what street?" Do you remember being asked that question?

A. You asked me what you did, yes.

Q. All right. Do you remember answering, "In the middle of Arthur Avenue"?

A. I don't recall that.

Q. You don't recall that?

A. I didn't have a ruler and measure it.

Q. What is that?

A. I didn't measure if it was the center or the—I told you within six feet from the curb, that is where I struck the old man.

Q. I see. Well, now, is your memory any better to-day than it was more than a year ago, about a year ago?

[fol. 131] Mr. Chance: I object. It calls for a conclusion.

Mr. Simon: He ought to know.

The Court: I will permit it.

Q. Is your memory any clearer to-day than it was a year ago?

A. Well, I wouldn't exactly say yes.

Q. Isn't it true that your memory was better almost a year ago than what it is to-day?

Mr. Chance: I object to it as calling for a conclusion.

Mr. Simon: He could tell us.

A. I don't know.

Q. You don't know. Well, now, had you ever driven a pleasure car before?

A. No, sir.

Q. Before this car?

A. No, sir.

Q. So that this was the first time that you ever drove——

A. A pleasure car, yes.

Q. —a pleasure car in your life?

A. Yes.

By the Court:

Q. Did you have a license to drive?

A. Yes, your Honor.

Q. How long had you had it?

A. Four years.

By Mr. Simon:

Q. You drove just trucks before that?

A. Trucks, yes, sir.

Q. How far would you say, Mr. Balbino, you were when you first realized you were going to hit this man?
A. I told you within forty feet.

(The question was read by the reporter.)

A. You mean when I was about to hit this old man?
Q. Yes.
A. I told you within six feet.
Q. And you were asked this question, and do you remember you were asked it, "How far were you from him [fols. 132-138] when you first realized you were going to hit him?" and your answer was, "Twenty feet"? Did you say that or didn't you say it?
A. I don't remember that.
Q. You don't remember. Your memory isn't quite clear to-day, then, at all about this accident, is it, Mr. Balbino?
A. (No answer.)
Q. So that from the time that you got on Arthur Avenue you were going about fifteen miles an hour?

The Court: Yes, he said that.

Q. Up to the time you struck the man you didn't slacken speed or stop?

The Court: Don't let us rehash it.
Mr. Simon: I think that is all.
Mr. Chance: Now I would like to call Mr. Young, this young man, the stenographer.
Mr. Simon: You mean Mr. Shaw?
Mr. Chance: Yes.

* * * * * * *

[fol. 139] The defendant rested.

[fol. 140] PLAINTIFF'S TESTIMONY IN REBUTTAL

IRVIN H. SIMON, sworn.

Direct examination.

By Mr. Simon:

Q. Mr. Simon, you are a clerk in my office, are you not?
A. I am.

Q. And my brother?
A. That is right.
Q. Did you, at my request, go to see Mr. Charles Young of Passaic, the defendant in this case?
A. I did.
Q. Do you recall about when it was?
A. The latter part of 1929.
Q. And at that time did you have a conversation with him as to whether or not he knew where Mr. Balbino was going to go with his car the day of August 4, 1929?
A. I did.
Q. Did he say to you that——

Mr. Chance: I object to that leading question.
Mr. Simon: That is right.

By Mr. Simon:

Q. What did you—what did he say to you as to where his car was being driven?

Mr. Chance: I object to it as irrelevant and immaterial, as to what he said about it.
The Court: What difference would it make?
Mr. Simon: What difference would it make? None, except on cross examination the defendant said a certain thing. I don't think it makes any difference. I don't care whether he went to Europe with it, as long as he had permission.
Mr. Chance: I object to it because it is immaterial.
The Court: Well, you brought that up yesterday, and I was wondering why.
Mr. Simon: Except they allege as a special defense——
[fol. 141] The Court: In other words, the testimony in this case is that this man gave him permission to use his car.
Mr. Simon: They allege in a special defense that they didn't know he was going to New York. That is the special defense, and because of that I just wanted to put Mr. Simon on in rebuttal to prove that he did know. But if your Honor feels it doesn't make any difference, although I think it does, because he gave him general permission.
The Court: You want to show that he knew he was going to New York?

Mr. Simon: Yes, that is the only purpose. I am afraid this may be a constitutional question that may be involved in the future, and I just want to lay a real foundation.

The Court: I suppose it is permissible for the purpose of contradicting a witness.

Mr. Simon: That is it, yes. They allege that as a special defense, and I think we ought to be permitted to put it in.

The Court: I will permit it and allow you an exception.

Mr. Chance: My objection is that it is immaterial and it makes no difference.

By Mr. Simon:

Q. What did Mr. Young say to you?

Mr. Chance: Exception.

The Court: Is that all Mr. Balbino said, he didn't tell him he was going to Rye Beach?

Mr. Simon: Mr. Young also stated that, if your Honor please.

The Court: And then Mr. Balbino being called by you said he didn't tell him he was going to Rye Beach. He was asked a question, "Didn't you tell Mr. Simon," and he said [fol. 142] no, he did not. Now, the question is presented now to contradict that statement.

Mr. Simon: That is it.

Mr. Chance: Yes, and my objection is it is immaterial whether he did tell him in the first place, whether he told him that.

The Court: Well, if it was immaterial I don't know why you asked it, then.

Mr. Chance: I didn't ask him; he asked it.

The Court: You asked it of the defendant himself when you called him. You called Mr. Young.

Mr. Chance: Yes, I called Mr. Young.

The Court: You asked him what he said and you asked him what he said about loaning the car and so forth.

Mr. Chance: I wanted to show that there was a bailment.

The Court: Yes, you wanted to show that there was a bailment and everything in connection with it, and being on direct examination he made the statement, and he was asked on cross examination if he was told that the man was going to take it to Rye Beach and he said no, he didn't

tell him where he was going. Now, this is to contradict that. I will permit it and allow you an exception.

By Mr. Simon:

Q. Where did he say the car was being driven?
A. Mr. Young told me that he was told by Mr. Balbino that the car was going to be driven by Mr. Balbino with some of his relations to Rye Beach, New York.

Mr. Simon: That is all.

[fol. 143] Cross examination.

By Mr. Chance:

Q. Did you go to see Mr. Young after the suit had been started?
A. That is right.
Q. Who sent you there? Your brother?
A. Dr. Aaron Simon.
Q. Didn't say anything to you about the ethics of interviewing the other side?

Mr. Simon: I object to it.

Q. Whether he had a lawyer, did he?

Mr. Simon: I object to it as immaterial and irrelevant.
The Court: Sustain it.
Mr. Chance: All right, that is all.

Both sides rested.

[fol. 144] Motion for Direction of Verdict

Mr. Chance: I move at this time for a directed verdict upon the ground that it appears in the case that Mr. Balbino had this car under a bailment made in New Jersey, and that at the time of operating the car when the accident occurred he was not the agent or servant in any sense of Mr. Young.

* * * * * * *

Fifth, because it appears from the evidence that Mr. Young was not in New York; that he made a bailment of

his car in New Jersey; that the driver at the time of the accident was not Mr. Young's agent, and so to apply the law of New York as to make Mr. Young responsible for anything that Mr. Balbino did would deprive Mr. Young of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the [fol. 145] United States, and would also deprive him of his liberty to contract and make contracts, in violation of the Fourteenth Amendment.

Sixth, upon the ground that it appears in this case that the plaintiff was guilty of contributory negligence and that he did not exercise reasonable observation, reasonable judgment, as to how and when to cross the street, in view of the approach of an automobile which he had seen approaching.

The Court: For the reasons already given by me on all of the objections made at this time on the request for a direction of a verdict, excepting the last ground, I will deny them and allow you an exception.

Mr. Chance: Yes. Exception.

* * * * * * *

(The Court charged the jury as follows:)

COURT'S CHARGE TO THE JURY

MACKAY, J.:

Members of the Jury:

The plaintiff, Anthony Masci, is seeking to recover damages from Charles Young, the defendant, by reason of injuries sustained by the plaintiff in an automobile accident happening on August 4, 1929, about ten-thirty or eleven o'clock on a Sunday morning. The plaintiff, as I recall it, said that he left his home on this particular morning and [fol. 146] was walking along the street toward the intersection of East 183rd Street and Arthur Avenue; that when he reached that point he intended to cross Arthur Avenue, going from east to west. He said he looked in different directions and he saw a car to the left about a block away; that he started to cross, and that when the driver of that car, Mr. Balbino, was a short distance away—you will re-

member just what that distance was—Balbino blew a horn, and that he was struck by that automobile about the middle or a little past the middle or center of the roadway, causing the injuries complained of.

The driver of the car, Balbino, said that he was traveling along Arthur Avenue at a speed of about fifteen miles an hour; that he kept up that speed and when about forty feet from where the plaintiff intended to cross; he saw the plaintiff in the roadway near the curb; that he blew his horn and that the plaintiff moved backward and forward, which caused him to be undecided as to just what he should do to avoid an accident. There is some testimony that was read to you that was taken in Mr. Simon's office, in which he said he swerved to the left to get out of the way of the plaintiff, but that the plaintiff came into his car and was injured.

Now, of course, the testimony is somewhat conflicting on the question of speed. First, I think it was fifteen to twenty miles an hour and then fifteen miles an hour, and I think the plaintiff himself said that the car which Balbino was driving was not going too fast and was not going too slow, or was not going fast or was not going slow, or something to that effect. In any event, the claim of the plaintiff is that the driver of this car was negligent and that his negligence was the cause of the accident and injuries. That is the plaintiff's claim.

The defendant, of course, claims that he simply loaned his car to Mr. Balbino. In fact, it is admitted in this case, [fol. 147] I think, that the car was loaned. There is some question as to whether or not the driver of the car, Balbino, who borrowed it, said he was going to Rye Beach or going to some beach or just going to borrow the car. In any event, as I understand it, it is admitted that he borrowed the car and was simply a borrower, so that what we call in law the relation of bailor and bailee existed between those parties; in other words, Young, the defendant, was the bailor and Balbino, the driver of the car, who borrowed it, was the bailee or borrower.

Now, the accident happened in New York City, and the plaintiff claims that because of the statute in New York, a statute law, the bailor—meaning Mr. Young, the defendant—is liable in this case if there was any negligence on the part of Balbino which was the proximate cause of the

accident and injuries, because this statute which was read to you creates a liability against the owner or bailor. And relying upon that New York law, the New York law has been offered in evidence in this case; that is, Section 59 of the law, or a part of Section 59. The defendant has also offered in evidence the remaining portion of Section 59 of the law, and subsection 10 of Section 70 of the law, relating to penalties and so forth.

Now, of course, in this case I have not given you all the facts in detail. There was testimony that the accident happened in the center of the street. There was testimony that the accident happened about six or seven feet out from the curb. There was testimony that the street may have been forty feet wide or forty-five feet wide, or it may have been narrower or it may have been wider. You must determine from all of the evidence as you have it before you just exactly what the truth of the matter is.

The burden of proof in this case is upon the plaintiff to [fol. 148] satisfy you by a fair preponderance of the testimony that the driver of this car, Balbino, was negligent and that his negligence was the proximate cause of the accident and injuries, and that, as you know, means by the greater and weightier evidence; it means by the more convincing testimony.

If you find on the question of negligence that the testimony is evenly balanced or that it preponderates in favor of the defendant, your verdict must be in favor of the defendant and against the plaintiff, no cause for action.

The defendant says, further, that the plaintiff in this case, Mr. Masci, was guilty of contributory negligence. First let me say for your information that our Courts have defined negligence to be the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do. And, as I told you, the burden of proving negligence by the fair preponderance of the testimony is upon the plaintiff.

Now, the defendant in this case says that the plaintiff was guilty of contributory negligence.

The negligence charged against the defendant by the plaintiff is that the driver of this car did not operate and

control his car in a reasonable and proper manner, with due care, thereby causing the accident in question.

Now, as I said, the defendant claims that the plaintiff was guilty of contributory negligence in that he did not use such care as a reasonably prudent person should use under the circumstances and conditions existing at that particular time, in that he saw this car and did not use that care which he was required to use to avoid being struck by it.

If you find that the plaintiff was guilty of any act of negligence which directly contributed to his injury, or was [fol. 149] guilty of any lack of ordinary care on his part, whether the act be an active one or an omission to do what he ought to have done under the circumstances, and such lack of care, act, or omission contributed to the accident, and without which the accident would not have happened, then you cannot render a verdict for the plaintiff, but your verdict must be in favor of the defendant and against the plaintiff, no cause for action. Of course, contributory negligence being an affirmative defense, the defendant is bound to prove it by a fair preponderance of the testimony.

Now, there was a section read to you relating to the Traffic Act, relating to the rights of pedestrians and vehicles in the street and the right of pedestrians to cross. "Pedestrians, where no police officer is present and no traffic light control system is in operation, shall have the right-of-way on crossings, and vehicles must slow down and stop, if necessary, to permit pedestrians on crossings to pass."

I do not recall any evidence in this case as to whether there was a policeman or traffic lights or anything there. You may know of evidence in the case relating to that, and, of course, if you do, you take it into consideration; if you do not, you do not take it into consideration at all. But even if it should appear and you should recall that there is any evidence on the subject to the effect that there was no police officer or traffic signal, this Traffic Act, if you should find that the driver of this car violated that Act, that in itself, standing alone, is not negligence. Our Courts have said that the Traffic Act was not intended to provide a hard and fast rule, applicable to all hazards and in all situations, regardless of actual conditions, and thus liberate from re-

sponsibility one who may be otherwise reckless and indifferent to the situation of others lawfully exercising equal rights upon the highway. The Traffic Act but adds an ad-
[fol. 150] ditional factor to be considered in a given situation, by which negligence may be measured and determined between conflicting claimants exercising a common right. Violations of the Motor Vehicle Act and of the Traffic Act do not of themselves constitute negligence. That is the law as laid down by our Courts in so far as the New Jersey Traffic Act is concerned, and bringing this Traffic Act into this court the same rule would apply.

As I understand it, it is not disputed under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability. Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides that "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner."

So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied. This article or ordinance only relates to the use of the automobile and not to the question of negligence.

If you find that the operator, Balbino, was driving this
[fol. 151] automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence on the part of the operator, Balbino, and the question of the contributory negligence on the part of the plaintiff.

If you find that the operator, Balbino, was negligent and that such negligence was the proximate and natural

cause of the accident and injuries, and that the plaintiff was free from contributory negligence, and also find from the evidence—which may not be disputed, but if it is that is for you to say—that permission was given to use this car and operate it, permission given by the defendant to Balbino—and I think I also said if you find that the plaintiff was not guilty of contributory negligence—then you would come to the question of the plaintiff's damages in this case.

The plaintiff would be entitled to recover as against this defendant, first, such sum as you believe to be fair and reasonable for the bodily injuries sustained. I believe there was some testimony to the effect that there was some injury to the head which required two stitches, and that there was a concussion which lasted for a period of about three months; that there were some other minor bruises on the body, and also that there was a compound, comminuted fracture of the left leg, and there was testimony as to the extent of that injury. And I think there was evidence to the effect that it was a permanent injury, but it is for you to say from the evidence what the extent of the injuries are, what the duration of the injuries will be. The testimony of the doctor, I think, as I said, was that the concussion lasted three months. If you find that that is not so, you find it from other evidence to that effect, because you must take all of the evidence in the case.

[fol. 152] So if you find for the plaintiff, the first thing you will consider is the amount to be allowed for the bodily injuries, such as I have indicated, and that amount will depend upon the extent of those injuries. It is for you to say whether the injuries in the leg are permanent as the result of this accident. That is for you to say from the evidence as you have it before you.

There was testimony, as I recall it, that this man was quite an elderly man, seventy years or more of age. You take that into consideration, too. In fact, as I said, you take all the evidence in the case into consideration.

If you find for the plaintiff and against the defendant, he would be entitled to such sum as is fair and reasonable for the pain and suffering endured from the time of the happening of the accident until that pain and suffering

ceased or until it ceases, depending on whether or not you believe there will be pain and suffering in the future.

If you find for the plaintiff he would be entitled to such sum as you believe to be fair and reasonable for the earnings lost. There was testimony to the effect that he was a tailor, to the extent that he was making coats, and that his earning averaged about sixty to seventy dollars a week, and that he had not been able to do any work from August 4, 1929, to date. It is for you to say from the evidence as you have it whether that is true or not, or whether there is a prospect of his working in the future, and if so to what extent and when. You take all those things into consideration in fixing that amount if you find for the plaintiff in this case.

If you find for the plaintiff and against the defendant he would be entitled, also, to the reasonable compensation for doctors' fees and other expenses. There is testimony to the effect that Dr. Condreras' bill of $350 is a reasonable [fol. 153] charge and Dr. Pasquale's bill of $150 is a reasonable charge, and that several items for ambulance, chair rental, for carting a chair, Columbus Hospital, crutches, X-ray laboratory, medicine, amounting to $98, plus the $350 and $150, are reasonable charges, which would make a sum of $598, as I have it here. That would be for you to say, however, if you find for the plaintiff in this case.

Now, if you find that any witness or witnesses who have testified have made any statements that you believe are untrue, that does not mean that you must necessarily reject all of their testimony. There is a legal maxim, a Latin maxim, which goes this way: "Falsus in uno, falsus in omnibus." That means, "False is one, false in all."

But our New Jersey Courts do not follow that rule. So that if you find a witness has told an untruth or more than one untruth, you can disregard that part that you believe is untrue and have a right to believe the remainder of the witness's testimony if you believe it is true, or you may disregard a witness's testimony entirely if you believe all of the testimony is false; and if you believe all the testimony is true, then you may believe all the testimony that the witness gives.

So it is for you to say what weight you will give to the evidence and what the truth of the matter is.

Now, the mere fact that counsel for the defendant made a motion for a non-suit, which is a dismissal of the case, or made a motion for a direction of a verdict—the mere fact that he did that has nothing to do with the case. That does not concern you at all. Those are simply questions of law addressed to me as the judge, that is all. You do not concern yourselves about those questions or those reasons, because your duty is to determine the facts in the case and not the law. So what counsel may have said, [fol. 154] either of them, on those motions you will entirely disregard and leave out of the case.

You must determine from the facts as you have them who is telling the truth. And if your verdict is for the plaintiff and against the defendant, then you would take the various items, the bodily injuries, the pain and suffering, the loss of earnings, and the other expenses for doctors, rental of chairs, and so forth, and you would put them into one lump sum and render a one lump sum verdict in favor of the plaintiff and against the defendant.

On the other hand, if you find a verdict in favor of the defendant, then your verdict is in favor of the defendant and against the plaintiff, no cause for action.

Take the case, give it your careful and thorough attention, and render a verdict that will square with the evidence as you have it before you.

Let the jury retire.

(The jury retired to consider of their verdict.)

[fol. 155] DEFENDANT'S EXCEPTIONS

Mr. Chance: I except to that part of the Court's charge wherein it stated that the laws of New York control on the question of liability.

I except to the part of the Court's charge wherein it read a portion of Section 59 of the Vehicle and Traffic Act of New York to the jury.

I except to the Court's charge where it was said in substance that all that is necessary to make Mr. Young responsible for Mr. Balbino's doings or omissions was the fact that permission might have been given by Mr. Young to Mr. Balbino to drive the car.

My basis for all of these objections are all of the things which I urged in the motion for a direction of a verdict and all of the things which I urged in objecting to the admission in evidence of these particular sections and parts of the New York law.

[fols. 156-158] I except upon the further ground that so to apply these New York statutes as to make Mr. Young liable for negligence on the part of Mr. Balbino, under the circumstances revealed by the evidence in this case, would be to deny to Mr. Young the equal protection of the laws, would take his property without due process of law, and would deprive him of his liberty without due process of law, all of which would be in contravention of the Fourteenth Amendment of the United States Constitution.

[fol. 159] In Supreme Court of New Jersey, Passaic County

[Title omitted]

Rule to Show Cause—Filed March 17, 1931

Application having been made on behalf of the defendant Charles Young, within six days after the verdict was rendered, for a rule to show cause why the verdict in the above entitled cause should not be set aside and a new trial granted, reserving exceptions, and said application having been duly considered:

It is, on this 17th day of March, 1931, on motion of Kellogg & Chance, attorneys for the defendant, Ordered, that the plaintiff show cause before the Supreme Court at the next term thereof at the City of Trenton, why the verdict in the above entitled cause should not be set aside and a new trial granted.

And it is further Ordered, that there are hereby reserved for appeal the exceptions taken at the trial by the counsel for the said defendant to the admission in evidence of the statute of New York, and the exception to the denial of the motion for a non-suit made by the counsel for the defendant, and the exception to the denial of the motion for a direction of a verdict, and the exceptions of defendant's said counsel to the charge of the court in so far as the same relates to the statutes of New York. And there is

[fols. 160-163] further reserved for appeal the question of whether the defendant Charles Young is legally liable under the evidence submitted in this cause for the negligence of Michael Balbino.

And it is further Ordered, that execution be, and hereby is, stayed pending an application for a new trial, and until the further order of this court.

William B. Mackay, Judge.

Service of copy of within rule to show cause is hereby acknowledged this 18th day of March, 1931.

Aaron L. Simon, Attorney for Plaintiff.

[fol. 164] In Supreme Court of New Jersey

Action at Law

Anthony Masci, Plaintiff,

vs.

Charles Young, Defendant

Remittitur—Filed November 24, 1931

It appearing from the record in the above entitled cause, that the plaintiff, Anthony Masci, had obtained a judgment against the defendant, Charles Young, in the sum of Fourteen Thousand Dollars, and the same having been prosecuted to the Supreme Court of New Jersey, on a Rule to Show Cause Why a New Trial Should not be granted, and the Supreme Court having ordered that the Rule to Show Cause be discharged upon the plaintiff consenting to a reduction of the judgment as aforestated to the sum of Ten Thousand Dollars, plaintiff, Anthony Masci, by his attorney Aaron L. Simon, does hereby consent to the reduction of said judgment to the sum of Ten Thousand Dollars.

Aaron L. Simon, Attorney for Plaintiff.

Dated: November 23rd, 1931.

[fol. 165] IN SUPREME COURT OF NEW JERSEY,
PASSAIC COUNTY

[Title omitted]

NOTICE OF APPEAL (STATING GROUNDS)—Filed November 30, 1931

To Aaron L. Simon, Esquire, Attorney of Plaintiff.

SIR:

Please Take Notice that Charles Young, defendant in the above stated cause, appeals from the whole of the judgment entered therein in the New Jersey Supreme Court, and every part thereof, to the New Jersey Court of Errors and Appeals, in the last resort in all causes, and the following are the grounds of appeal:

1. The Trial Judge erred in admitting in evidence over the objection of counsel for the defendant, Exhibit P-4, which is a part of Section 59 of Chapter 54 of the Laws of 1929 of the State of New York, entitled, "An Act relating to motor vehicles, motor cycles and highway traffic constituting Chapter 71 of Consolidated Laws," the part of said section so introduced reading as follows:

[fol. 166] "Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner."

to which admission in evidence exception was duly noted by defendant's counsel.

2. The Trial Judge erred in denying defendant's motion for a non-suit, to which denial of motion exception was duly entered by defendant's counsel.

* * * * * * *

5. The Trial Judge erred in denying the motion made by defendant's counsel for the direction of a verdict in favor

of the defendant which should have been granted upon one or more of the following grounds:

First, that it appears in the case that Mr. Balbino had this car under a bailment made in New Jersey, and that at the time of operating the car when the accident occurred he was not the agent or servant in any sense of Mr. Young.

* * * * * * *

[fol. 167] Fifth, because it appears from the evidence that Mr. Young was not in New York; that he made a bailment of his car in New Jersey; that the driver at the time of the accident was not Mr. Young's agent, and so to apply the law in New York as to make Mr. Young responsible for anything that Mr. Balbino did would deprive Mr. Young of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and would also deprive him of his liberty to contract and make contracts, in violation of the Fourteenth Amendment.

* * * * * * *

[fol. 168] 6. The Trial Judge erred in charging the jury as follows:

"Now, the accident happened in New York City, and the plaintiff claims that because of the statute in New York, a statute law, the bailor—meaning Mr. Young, the defendant —is liable in this case if there was any negligence on the part of Balbino which was the proximate cause of the accident and injuries, because this statute which was read to you creates a liability against the owner or bailor. And relying upon that New York Law, the New York law has been offered in evidence in this case; that is, Section 59 of the law, or a part of Section 59."

to which portion of the Court's charge exception was duly entered by defendant's counsel.

7. The Trial Judge erred in charging the jury as follows:

"As I understand it, it is not disputed, under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and,

therefore, under the rule of law I charge you that the laws of the state where the accident happened control with respect to liability."

to which portion of the Court's charge exception was duly entered by defendant's counsel.

8. The Trial Judge erred in charging the jury as follows:

[fol. 169] "Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides 'Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner.' "

to which portion of the charge of the Court exception was duly entered by defendant's counsel.

9. The Trial Judge erred in charging the jury as follows:

"So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied."

to which portion of the charge of the Court exception was duly entered by defendant's counsel.

10. The verdict is contrary to law.

11. The evidence submitted in this cause does not show any legal liability on the part of the defendant, Charles Young, for the negligence of Michael Balbino.

12. The judgment in favor of Anthony Masci and against the defendant Charles Young, which has been entered in [fols. 170-173] this cause, deprives the defendant Charles Young of his property without due process of law in viola-

tion of the Fourteenth Amendment of the Constitution of the United States, and deprives him of his liberty to contract and to make contracts in violation of the said Fourteenth Amendment, and denies him equal protection of the law in violation of said Fourteenth Amendment.

Yours, &c.

Kellogg & Chance, Attorneys for Defendant-Appellant.

[fol. 174] In Court of Errors and Appeals of New Jersey

October Term, 1932

On Appeal from Supreme Court

Between

Anthony Masci, Plaintiff-Respondent,

vs.

Charles Young, Defendant-Appellant

Judgment—Filed Oct. 27, 1932

This cause having been duly argued at the May Term, 1932, of this court by Kellogg & Chance, by R. Robinson Chance, of counsel for the Appellant, and Aaron L. Simon, of counsel for the Respondent, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this 17th day of October, in the year of our Lord one thousand nine hundred and thirty-two ordered and adjudged that the judgment of the Supreme Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Aaron L. Simon, Attorney for Respondent.

A true copy.

Thomas A. Mathiss, Clerk.

[File endorsement omitted.]

[fol. 175] In Court of Errors and Appeals of New Jersey

No. 108. May Term, 1932

Anthony Masci, Plaintiff-Respondent,

vs.

Charles Young, Defendant-Appellant

Argued May 20th, 1932. Decided October 17th, 1932

In a suit wherein the cause of action arose in another state, the courts of this state will apply the law of the foreign state applicable thereto when it is not penal in nature, when it is not contrary to the policy of the law of this state, and when the local judicial procedure is adequate to enforce it.

On appeal from a judgment of the Supreme Court.

For the appellant: Kellogg & Chance, Esqs.
For the respondent: Aaron L. Simon, Esq.

Opinion—Filed Oct. 17, 1932

The opinion of the court was delivered by

Donges, J.:

This appeal brings up a judgment of the Supreme Court, in favor of the plaintiff and against the defendant, entered on postea on verdict at the Passaic Circuit after a trial before Judge Mackay and a jury.

The defendant Young lent his automobile to one Balbino, who took it to the City of New York, and, whilst operating it there, collided with plaintiff and injured him, for which injuries the judgment was obtained.

The defendant Young was a resident of the State of New Jersey, and was in this state at the time of the bailment to Balbino and, likewise, at the time of the collision complained of.

The statute of New York invoked to impose liability upon the defendant provides:

"Every owner of a motor vehicles or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from [fol. 176] negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner."

This statute was applied at the trial and it is this action of the trial judge that is assigned as error. The question is presented on motions to the judge to control the case, as well as by exceptions to the charge and the refusal to charge.

This is a transitory action. In Ackerson vs. Erie Railroad Co., 31 N. J. L. 309, it was said:

"Transitory actions are such personal actions as seek only the recovery of money or personal chattels, whether they sound in tort or contract. They are universally founded on the supposed violation of rights, which, in contemplation of law, have no locality."

In Dennick vs. Central Railroad Company, 103 U. S. 439, it was said:

"Wherever, by either the common law or the statute law of a State, a right of action has become vested and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has competent jurisdiction of such matter and can obtain jurisdiction over the parties."

In such actions the law of the state in which the cause of action arose will by comity be applied, if comity should be extended. Harber vs. Graham, 105 N. J. L. 213.

It is not denied that the provision quoted is the law of the State of New York. The constitutionality of the act has been sustained by the courts of that state. Downing vs. City of New York, 220 N. Y. S. 76; Dawley vs. McKibbin, 245 N. Y. 557.

It seems to be the settled law that certain classes of foreign created actions will not be enforced, namely, those which are penal, those which are contrary to the policy of

the law of the state in which the suit is brought, and those for whose enforcement the local judicial procedure is inadequate.

[fol. 177] Appellant argues that the statute in question imposes a penalty. But this is obviously not so. It does not impose a penalty, it merely establishes a right. It visits only lawful damages for violation of a right. Kenneally vs. Leary, 67 N. J. L. 435.

Nor is it contrary to the policy of our law. Our statute imposes upon a non-resident, by the fact of operation of his car in this state, an agency in a designated public official to accept service of process in any action for damages arising out of such operation in this state. Such legislation has been held to be valid, and is not in contravention of the due process clause of the constitution. Kane vs. New Jersey, 242 U. S. 160; Hess vs. Pawloski, 274 U. S. 352.

Our judicial procedure is adequate to enforce this right.

The insistence of the appellant is that the New York statute can have no effect to impose liability upon an owner who is a resident of New Jersey and who was in New Jersey at the time of the occurrence complained of, when the lending or bailment took place in New Jersey. There was some testimony that the appellant knew that Balbino intended to operate the car in the State of New York. The appellant denied such knowledge and denied having said to a witness that he knew Balbino was going to New York.

In Harber vs. Graham, supra, the parties were residents of New Jersey, and drove to Massachusetts, where the injury occurred, and this court held that the accident having taken place in Massachusetts, the law of that state applied.

It is recognized by the courts generally that the use of automobiles upon the public highways presents serious hazards to the public. In Hendrick vs. Maryland, 235 U. S. [fol. 178] 610, Mr. Justice McReynolds says:

"A state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others."

In Kane vs. New Jersey, 242 U. S. 160, Mr. Justice Brandeis comments upon the danger to the public in the use of automobiles and says:

"The power of a state regulate the use of motor vehicles on its highways has been recently considered by this court and broadly sustained. It extends to non-residents as well as to residents."

He further says in commenting on the decision in Hendrick vs. Maryland, supra:

"It was recognized in discussing it, that 'the movement of motor vehicles over the highways is attended by constant and serious dangers to the public' (p. 622). We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the legislature of New Jersey was unreasonable in believing that ability to establish by legal proceedings within the state, any financial liability of non-resident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners."

So here, an owner is presumed to know the law, and if he permits his car to be operated in New York State, he subjects himself to the laws of that state touching such operation.

The reasoning of Mr. Justice Katzenbach in Pizzutti vs. Wuchter, 103 N..J. L. 130, in support of the power of a state to require an owner who uses or permits his property to be used in a foreign state, to submit himself to the courts of that state on process served upon a public official as his agent for such purpose, is pertinent. He holds that states, in the exercise of the police power, may impose the terms upon which their highways may be used by motor vehicles of non-resident owners, and says:

[fols. 179-181] "We think the basis of jurisdiction in the present case over the defendant, who was not a citizen of

this state, not served with process within the state, and who has not expressly consented to the exercise of jurisdiction of our courts over him, rests upon the doctrine that a state may, without violating any constitutional limitation, forbid the doing of certain acts within the state unless and until the person who does the acts has consented to the jurisdiction of the courts of the state as to causes of action growing out of the doing of such acts within this state. It is within the power of a state to provide by law that the doing of such acts by a non-resident as the state can prohibit shall subject to the non-resident doing them to the jurisdiction of our courts as to such actions as arise within the territorial limits of the state.

"Such laws as the one under consideration seem but the reasonable exercise of the rights of a state for protection of its own citizens. If non-residents feel the law harsh they can easily avoid its operation, so far as they are concerned, by refraining from operating their automobiles within the territorial limits of the states which have enacted such laws."

If a state may, without violating the constitution of the United States, forbid a non-resident to operate or cause to be operated an automobile within the State, unless thereby he authorizes a state official to receive service to process in actions instituted against him which result from such operation, and makes himself subject to the laws of this state, Kane vs. New Jersey, supra, a state may impose upon an owner of such car liability for such permitted operation of his car within a state, according to the law of that state. If the rule were otherwise, a foreign owner might send his car into a state and avoid liability for its negligent operation under the law of the state upon the ground that no liability would attach to him in consequence of such negligent operation under the law of his own state. Such a result does violence to reason and justice.

The judgment of the Supreme Court is affirmed.

[File endorsement omitted.]

[fol. 182] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

(Title Omitted)

ASSIGNMENT OF ERRORS—Filed Jan. 7, 1933

Now comes the Appellant, Charles Young, and makes the following Assignments of Errors in the above-entitled cause:

1. The New Jersey Court of Errors and Appeals erred in deciding that Section 59 of Chapter 54 of the Laws of 1929 of the State of New York, which is as follows:

"Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motorcycle in the business of such owner or otherwise by any person legally using or operating the same with the permission express or implied of said owner."

is valid and is not repugnant to Section 10 of Article 1 of the Constitution of the United States and not repugnant to the 14th Amendment to the Constitution of the United States in its application to the Appellant, said Charles Young, in this case.

2. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the Supreme Court of New Jersey, denying Defendant's motion to strike out the first and second counts of Plaintiff's Amended Complaint, which for cause of action set out Sec. 59, Ch. 54 of the Laws of 1929 of the State of New York, above quoted, and in deciding that said statute in its application to the Appellant in this case, was valid, and did not deny him equal protection of the Law, and did not deprive him of liberty and property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

[fol. 183] 3. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court, in admitting in evidence at the trial, over the ob-

jection and exception of the defendant, Sec. 59, Ch. 54 of the Laws of 1929 of the State of New York, above quoted; and erred in deciding that such application of such statute to the Appellant, Charles Young, in this case was valid, was not repugnant to the 14th Amendment to the Constitution of the United States, did not deny him equal protection of the law, and did not deprive him of liberty or property without due process of law.

4. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court in denying the motion of the Defendant, Charles Young, made at the close of all the evidence, to direct the jury to return a verdict in his favor, and erred in failing to decide that to apply said Sec. 59, Ch. 54 of the 1929 Laws of New York to Appellant, Charles Young, in this case would deprive him of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States; would deprive him of his liberty to contract and make contracts, in violation of the 14th Amendment; would deny him the equal protection of the laws in violation of the 14th Amendment, and would violate Section 10 of Article 1 of the Constitution of the United States by impairing the obligation of an existing contract of the Appellant, Charles Young.

5. The New Jersey Court of Errors and Appeals erred in affirming the judgment of the New Jersey Supreme Court and its action in charging the jury, over the objection and exception of the Defendant, Charles Young, as follows:

"As I understand it, it is not disputed under the evidence submitted in this case that the accident happened in the City of New York and the State of New York, and, therefore, under the rule of law I charge you that the laws [fol. 184] of the state where the accident happened control with respect to liability. Section 59 of the Motor Vehicle and Traffic Act of New York, among other things, provides that 'Every owner of a motor vehicle or motorcycle operated upon a public highway shall be liable and responsible for death or injury to person or property resulting from negligence in the operation of such motor vehicle or motorcycle, in the business of such owner or

otherwise, by any person legally using or operating the same, with the permission, express or implied, of such owner.'

"So I charge you that it is immaterial whether or not the operator, Michael Balbino, was at the time of the accident operating the automobile of the defendant, Charles Young, on his own business or on Young's business. All that is necessary for you to find is that the operator, Michael Balbino, was at the time of the accident operating this automobile with the defendant's permission, either express or implied. This article or ordinance only relates to the use of the automobile and not to the question of negligence.

"If you find that the operator, Balbino, was driving this automobile at the time of the accident with the permission of the defendant, either express or implied, you must then determine the question of negligence on the part of the operator, Balbino, and the question of the contributory negligence on the part of the plaintiff.

"If you find that the operator, Balbino, was negligent and that such negligence was the proximate and natural cause of the accident and injuries, and that the plaintiff was free from contributory negligence, and also find from the evidence—which may not be disputed, but if it is that is for you to say—that permission was given to use this car and operate it, permission given by the defendant—to Balbino—and I think I also said if you find that the plaintiff was not guilty of contributory negligence—then you would come to the question of the plaintiff's damages in this case.

"The plaintiff would be entitled to recover as against this defendant, first, such sum as you believe to be fair and reasonable for the bodily injuries sustained."

and erred in deciding that Sec. 59, Ch. 54 of the 1929 Laws of New York as so applied to the Appellant, Charles Young, in this case, was valid and did not deprive him of liberty or property without due process of Law, did not deny him the equal protection of the Law, in violation of the 14th Amendment to the Constitution of the United States, and did not impair the obligation of an existing contract of the Appellant, Charles Young, in violation of

Section 10 of Article 1 of the Constitution of the United States.

[fol. 185] For which errors the Appellant prays that the Judgment of the New Jersey Court of Errors and Appeals be reversed, and that appropriate Judgment in his favor be rendered.

R. Robinson Chance, Counsel for Appellant, Charles Young.

[fol. 185½] Service of 1 true copy of the within instrument is hereby acknowledged this 6th day of Jan. 1933.

Aaron L. Simon, Attorney of Plaintiff.

[File endorsement omitted.]

[fol. 186] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—Filed Jan. 7, 1933

Upon consideration of the Petition of Charles Young praying for the allowance of an appeal to the Supreme Court of the United States, from the judgment herein rendered on October 27, A. D. 1932 by the New Jersey Court of Errors and Appeals, it is hereby ordered that the appeal is allowed upon the approval and filing of bond in the sum of $12,000 to act as a supersedeas bond, and conditioned as required by law.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

[fols. 186½-194] [File endorsement omitted.]

Service of 1 true copy of the within instrument is hereby acknowledged this 6th day of Jan. 1933.

Aaron L. Simon, Attorney of Plaintiff.

[fol. 195] SUPREME COURT OF UNITED STATES

STATEMENT OF POINTS AND DESIGNATION FOR PRINTING RECORD—Filed Jan. 27, 1933

Now comes the Appellant in the above-entitled cause and states that the points upon which he intends to rely in this case are as follows:

Point 1. The Statute of the State of New York, Sec. 59, Ch. 54 of the Laws of 1929 is unconstitutional and void in its application to the Appellant in this case and repugnant to Sec. 10, Article 1 of the Constitution of the United States in that it impairs the obligation of an existing contract of the Appellant.

Point 2. The aforesaid Statute of the State of New York is unconstitutional and void and repugnant to the 14th Amendment to the Constitution of the United States in that in its application to the Appellant in this case it deprives him of liberty without due process of law.

Point 3. The aforesaid Statute of the State of New York is unconstitutional and void and repugnant to the 14th Amendment to the Constitution of the United States in that in its application to the Appellant in this case it deprives him of property without due process of law.

Point 4. The aforesaid Statute of the State of New York is unconstitutional and void and repugnant to the 14th Amendment to the Constitution of the United States in that in its application to the Appellant in this case the State of New Jersey denies him the equal protection of the law of New Jersey.

Point 5. The New Jersey Court of Errors and Appeals erred in deciding that the aforesaid Statute of the State of New York was a valid and constitutional law as applied to the Appellant in this case.

Designation for Printing Record

The Clerk will please print the portions of the Record specified below:

1. Amended Complaint.
2. Notice of Motion to Strike out Amended Complaint and parts thereof.

[fol. 196] 3. Rule denying Motion to Strike out Amended Complaint and parts thereof.

4. Answer to Amended Complaint.

5. Postea (P. 25-A Record).

6. Judgment on Postea (P. 25-B Record).

7. Appearances (P. 26 Record).

8. The testimony of Michael Balbino.

9. Beginning with the words "The Court" in the 24th line of page 73, to and including the words "The Court-Oh Yes" in the 11th line of page 74.

10. Last five lines of page 74, beginning "Mr. Simon."

11. The words "Mr. Chance" in 17th line of page 75.

12. Beginning with the words "And I object to it further" in 29th line of page 76, to and including the first three lines on page 77.

13. Beginning with the words "The Court" in 12th line of page 79, to and including the word "Admission" in the 16th line.

14. Beginning with the words "Mr. Simon" in line 16, page 84 to end of page 84.

15. Testimony of Anthony Masci.

16. "The Plaintiff rested" on page 100.

17. All of page 101.

18. First 4 lines of page 102, and beginning with "By Mr. Simon" in line 22 of page 102, to and including the words "of 1929" in line 23 of page 103.

19. Testimony of Lena Balbino.

20. Testimony of Michael Balbino (pp. 114-132 inc.).

21. "The Defendant rested" on page 139.

22. All of pages 140 to 143, inclusive.

23. "Motion for Direction of Verdict" and first 7 lines of page 144, and beginning with the word "Fifth" in line 27 of page 144, to and including the words "Yes, exception", in 16th line of page 145.

24. The Charge of the Court.

25. Beginning with the words "Mr. Chance" in the 5th line of page 155, to and including the words "New York law" in the 21st line of page 155.

[fol. 197] 26. Beginning with the words "I except upon" in the 21st line of page 156 to and including the words "United States Constitution" in line 30 of page 156.

27. Rule to Show Cause (pp. 159-160).

28. Remittitur (p. 164).
29. All of page 165.
30. All of page 166, excepting paragraphs numbered "3" and "4."
31. First 14 lines of page 166—last 10 lines of page 166.
32. Paragraph numbered "Fifth" beginning with 19th line of page 167.
33. All of page 168, excepting first two lines.
34. All of page 169.
35. All of page 170.
36. Final judgment of the New Jersey Court of Errors and Appeals.

R. Robinson Chance, Daniel Thew Wright, Counsel for Appellant.

[fol. 198] Service of 1 true copy of the within instrument is hereby acknowledged this 6th day of Jan., 1933.

Aaron L. Simon, Attorney of Plaintiff-Appellant.

[fol. 199] [File endorsement omitted.]

Endorsed on cover: File No. 37,340. New Jersey Court of Errors and Appeals. Term No. 643. Charles Young, appellant, vs. Anthony Masci. Filed January 27, 1933. File No. 37,340.